

No. 13085

United States
Court of Appeals
for the Ninth Circuit.

HOWARD M. COURTNEY,

Appellant,

vs.

CUSTER COUNTY BANK, a Corporation, and
OLIVER T. DAVIS,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Eastern Division

FILED

NOV - 7 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HENRY McQUADE, ESQ.,
Pocatello, Idaho,

R. DON BISTLINE, ESQ.,
Pocatello, Idaho;

For the Plaintiff.

O. R. BAUM, ESQ.,
Pocatello, Idaho;

RUBY Y. BROWN,
Pocatello, Idaho,

For the Defendants.

In the District Court of the United States of
America, in and for the District of Idaho,
Eastern Division

1598

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendants complains and alleges:

I.

That plaintiff is now and at all times hereinafter
mentioned has been a resident of the State of
California.

II.

That the defendant Custer County Bank is an
Idaho banking corporation, duly organized and
existing under and by virtue of the laws of the
State of Idaho and qualified to do business in the
State of Idaho, with its principal place of business
at Challis, Custer County, Idaho; that defendant
Oliver T. Davis is now and at all times hereinafter
mentioned was an officer of said corporation, acting
in his employment as an agent and employee of
said corporation, to wit, Cashier.

III.

That at the time and place hereinafter set forth, the Fourth of July Mining Company was an Idaho mining corporation organized and existing under and by virtue of the laws of State of Idaho, with its principal place of business at Sunbeam, Idaho.

IV.

That on or about the 22nd day of November, 1946, the said Fourth of July Mining Company made, executed and delivered to said defendant banking corporation its certain chattel mortgage on personal property, in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), which said mortgage is on record as Instrument No. 9490, 97777 of the records of Custer County, Idaho, filed for record November 25, 1946, in Book 8, Minutes of Mortgages on Personal Property, at page 166, covering the following described personal property, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 New generator and 12 motors, ranging from 30 HP down to 1½ HP;
- Blacksmith shop, complete;
- 1 Pelton wheel, complete, and all miscellaneous tools and fittings;

- All assay equipment;
- 1 Chicago pneumatic compressor, Serial 61879 (8033096);
- 10 Tons of rail;
- 5500 feet of pipe and fittings;
- 1 150 HP Diesel Motor, complete with direct-driven generator.

V.

That thereafter, but some time prior to September 23, 1947, that said defendant banking corporation, by and through its agent, Oliver T. Davis, learned, or was advised, or discovered, that certain property in the above-described mortgage on personal property did not belong to the mortgagors, that is, said Fourth of July Mining Corporation, said property being, to wit, a portion or all of the following described property:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 Blacksmith shop, complete, less anvil;
- 10 Motors, ranging from 30 HP to 1½ HP;
- 1 150 HP Diesel Motor, complete with direct-driven generator;

that said banking corporation thereupon, by and

through its agent, Oliver T. Davis, demanded of said mining corporation and its officers immediate payment of said above-described mortgage, and did further advise said mining corporation and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own.

VI.

That after such threat of criminal prosecution by the said defendant banking corporation, by and through its agent, Oliver T. Davis, said mining corporation and its officers entered into negotiations with plaintiff for the loan of the sum of Ten Thousand Dollars (\$10,000.00); that plaintiff, without any knowledge of the facts set forth in paragraph V hereof, offered and agreed to loan said sum to said mining corporation, provided said mining corporation would give as security to plaintiff for such loan a mortgage upon all the property that said mining corporation had at said time mortgaged to the defendant bank, together with certain additional property that said mining corporation had mortgaged to one Roy E. Bassett, said property mortgaged to Bassett being as follows, to wit:

- One 1941 GMC Truck, Motor No. 27,025,819,
Serial No. 159729A2;
- One 200 Am. Lincoln portable welder.

VII.

That, for the purpose of consummating said transaction, plaintiff came to Challis, Idaho, and with the officers of said mining corporation, and on the 23rd day of September, 1947, went to the defendant bank and its agent, Oliver T. Davis, Cashier; that said bank and its agent, Oliver T. Davis, were engaged by plaintiff and said mining corporation to prepare the papers and handle the escrow and serve as escrow holder in connection with the preparation of the said mortgage for Ten Thousand Dollars (\$10,000.00), and the disbursement of the sum of \$10,000.00 being loaned by plaintiff to said mining corporation.

That at said time and place the defendant corporation, by and through its agent, defendant Oliver T. Davis, well knew and was informed that the loan was being made by plaintiff to said mining corporation for the purpose of said mining corporation paying off the above-described mortgage obligation of said mining corporation to the bank; that said banking corporation, by and through its agent, Oliver T. Davis, further knew that the reason said mining corporation was paying such obligation to defendant bank was that it, the said banking corporation, by and through its agent, Oliver T. Davis, had demanded payment from such mining corporation at once or criminal prosecution would be instituted against the mining corporation and its officers for mortgaging property not belonging to such mining corporation.

That further, and by reason of the fact that said

defendant bank, by and through its agent, Oliver T. Davis, was employed and assumed the responsibility of preparing said mortgage, promissory note, assignment of lease agreement, mortgage release and escrow agreement, and was further employed to act as escrow holder, the said defendant bank and its agent, Oliver T. Davis, became fiduciary agents of plaintiff, and thereby were bound and required to advise, disclose, reveal and divulge to said plaintiff their interest in said proposed loan of \$10,000.00 from plaintiff to said mining corporation, and all information concerning the mortgage of said mining corporation to the defendant bank, and knowledge of the unlawful mortgaging by said mining corporation of property it did not own; that the said defendant bank did not make such disclosures, but accepted such employment as herein set forth.

VIII

That the defendant banking corporation, by and through its agent, Oliver T. Davis, was on the 23rd day of September, 1947, given the following instructions by plaintiff for the preparation of said mortgage and escrow agreement, to wit:

(a) Prepare a mortgage covering all property described in the mortgage hereinabove described as held by said defendant bank, and covering in addition thereto the property described in the mortgage held by said Roy A. Bassett, as hereinbefore described.

(b) Upon the execution of such mortgage on personal property and a promissory note

secured by such mortgage, and the performance of other conditions hereinafter set forth, to pay over the sum of Ten Thousand Dollars (\$10,000.00), delivered by plaintiff to said defendant bank, to the said mining corporation.

(c) To prepare an escrow agreement, by the terms of which said bank was to act as escrow holder and hold an assignment of lease agreement made by said mining corporation to plaintiff, and the aforesaid promissory note, and to disburse the said \$10,000.00.

(d) To record the mortgage and to prepare and obtain a release of the mortgage held by said defendant bank on the property of the said mining corporation.

IX.

That thereafter the said defendant bank, by and through its agent, Oliver T. Davis, in violation of the aforesaid instructions of the plaintiff and, further, without disclosing to plaintiff its knowledge or that of its agent, Oliver T. Davis, with respect to the mortgage held by it, wherein said mining corporation mortgaged property not belonging to it and, further, without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis, to said mining corporation and its officer, and acting as the fiduciary agent of plaintiff in the preparation of the mortgage and escrow agreement, did prepare such mortgage and did knowingly, fraudulently, and designedly, and with the intent to defraud and deceive plaintiff,

prepare such mortgage contrary to the instructions of plaintiff, in the following particulars, to wit:

1. Prepared a mortgage covering the following described property, to wit:

- 1 Compressor, Chicago, 315 cu. ft., with 6-cylinder gas motor; 500 feet of air hose, 1¼ inch;
- 2 Stopers, Ingersoll-Rand, complete w/fittings;
- 1 Jack hammer, Ingersoll-Rand;
- 6 Sets steel for stopers;
- 1 Box diamond points;
- 15 Ton of rail;
- 4 Ore cars;
- 5,500 feet pipe and fittings;
- 1 Carriage car;
- 1 Air receiver tank, large;
- 2 Water receiver tanks;
- 2 Knockdown 54-bbl. tanks;
- 2 30-HP motors;
- 2 Wagon drills, Ingersoll- Rand;
- 1 Generator, 123 HP, powered by Pelton wheel, complete;
- 1 Large anvil;
- 20 Rolls tar paper;
- 1 Set pipe cutters and dies;
- 1 Paint spray outfit w/Curtis compressor; Wisconsin motor, mounted on Menterden trailer;
- 1 Mill located on Buckeye mill site, adjacent to Yankee Fork in Custer County, Idaho;

Assay Equipment:

- 1 Rock crusher;
- 1 Braun pulverizer
- 1 Furnace burner;
- 2 Small butane burners;
- 1 Butane regulator;

which property in said mortgage as prepared by the defendant bank, through its agent, Oliver T. Davis, was the property described on a list furnished said Oliver T. Davis by said mining corporation by and through its agents, which list plaintiff had never been furnished and which the defendant bank, through its agent, Oliver T. Davis, knew had not been furnished to, nor exhibited to, plaintiff.

2. Prepared a mortgage contrary to the instructions of plaintiff, in that the following described property was omitted, to wit:

One 1941 GMC Truck, Motor No. 27,025,819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder.

which was the property described in that certain mortgage from the mining corporation to Roy A. Bassett, and was omitted, although defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include such equipment in the mortgage being made and given as security for the loan of \$10,000.00 by plaintiff to said mining corporation.

3. Prepared a mortgage contrary to the instruc-

tions of plaintiff, in that the following described property was omitted, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40-HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- Blacksmith shop, complete;
- 1 150-HP Diesel motor, complete w/direct-driven generator;

which said property was described in that certain mortgage from the mining corporation to the defendant bank, and was omitted although the defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include all equipment in said mortgage from the mining company to said bank, in the mortgage being made from the mining company to plaintiff, as security for the loan of \$10,000.00 by plaintiff to said mining corporation.

X.

That, further, the said defendant bank, by and through its agent, Oliver T. Davis, well knowing that certain property described and mortgaged in the mortgage held by it from the said mining company did not belong to said mining company, and further well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened

said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation, if said mortgage was not paid, did knowingly, fraudulently and designedly, and with the intent to deceive, defraud and mislead plaintiff, and for its own gain and benefit, and although serving in a fiduciary relationship to plaintiff, in the preparation of such mortgage and escrow agreement, and acting as escrow holder, did fail, neglect and refuse to disclose, divulge or reveal to plaintiff such information.

XI.

That by reason of not disclosing such previous fraudulent transaction of said mining corporation, although having actual knowledge thereof, and by violation of the oral instructions of the plaintiff as hereinabove alleged and set forth, and by reason of the receipt of payment in full of its mortgage hereinabove described, by virtue of the \$10,000.00 loan made by plaintiff, the defendant bank, by and through its agent, Oliver T. Davis, did knowingly, wilfully, fraudulently and designedly, and with intent to defraud and deceive, did then and there defraud the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00), and did violate its fiduciary relationship with plaintiff.

XII.

That, by reason of the fraudulent acts and omissions aforesaid of the defendant bank, by and through its agent, Oliver T. Davis, and in reliance

thereon, the plaintiff, being in good faith, and without knowledge of said fraudulent acts, and relying upon the good faith of the defendants, was induced to and did pay out, and has been deprived of, the sum of \$10,000.00.

XIII.

That, by reason of the willful and designed fraudulent acts and deceit of the said defendants, in defrauding plaintiff of the sum of \$10,000.00, as aforesaid, plaintiff is entitled to punitive and exemplary damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

XIV.

That in addition to the damages aforesaid by reason of the willful and designed fraudulent acts and deceit of the said defendants in defrauding plaintiff, the plaintiff has been compelled to employ attorneys to prosecute this action in his behalf, and has agreed to pay them a reasonable fee, and that a reasonable fee for the bringing of this action is Three Thousand Five Hundred Dollars (\$3,500.00).

Wherefore, Plaintiff prays for judgment against the above-named defendants as follows, to wit:

1. For the sum of Ten Thousand Dollars (\$10,000.00), principal;
2. For the sum of Twenty-five Thousand Dollars (\$25,000.00) for punitive and exemplary damages;
3. For the sum of Three Thousand Five Hun-

dred Dollars (\$3,500.00) for attorney fees in said action;

4. For costs of this action and for such other and further relief as to the Court may seem just and proper in the premises.

/s/ HENRY McQUADE,
Attorney at law;

/s/ R. DON BISTLINE,
Attorney at Law; Attorneys
for the Plaintiff.

State of Arkansas,
County of Gill—ss.

Howard M. Courtney, being first duly sworn upon his oath, deposes and says:

That he is the plaintiff named in the within-entitled action; that he has read the above and foregoing Complaint and knows the contents thereof, and that the facts therein stated are true, as he verily believes.

/s/ HOWARD M. COURTNEY.

Subscribed and Sworn to before me this 9th day of January, 1950.

[Seal] /s/ H. C. SCOTT,
Notary Public.

Commission Exp.: 8/18/51.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

The defendants herein move the court for an order requiring the plaintiff herein to furnish a bill of particulars in the following matters, to wit:

To set forth in sub-section 2 of paragraph IX the value of the property that should have been in said mortgage, namely:

One 1941 GMC Truck, Motor No. 27025819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder,

and also to set forth in sub-section 3 of the same paragraph the value of the property described therein.

It is alleged in said sub-sections that certain property was omitted from the said mortgage and the property is described, but nowhere is it alleged the value of said property that was omitted, and by reason thereof one cannot ascertain the value of the remaining property so covered by said mortgage as distinguished from the value of the property that was omitted.

The defendants likewise move the Court for an order requiring the plaintiff to set forth when, in reference to the time of the drafting of the said mortgage, that he discovered that the property was not included in the said mortgage, that is, he

should allege with particularity when the alleged fraud was discovered.

Dated this 22nd day of February, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendants.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE
STATEMENT

Come now the defendants, and each of them, and move the Court for an order requiring the plaintiff herein to give a more definite statement, and for reasons thereof state:

a. That nowhere in sub-section 2 of paragraph IX is the value of the property that should have been mortgaged, namely:

One 1941 GMC Truck, Motor No. 27025819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder,

set forth, and likewise the value of the property set forth in sub-section 3 of the same paragraph is not set forth, and nowhere can one ascertain what the value of such property was so that one would know what the value of the remaining property that was mortgaged was.

b. The complaint sets forth that the plaintiff discovered that certain property was included in the mortgage, but nowhere does he allege when he discovered that certain property was not included in the said mortgage.

Dated this 23rd day of February, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendants, Residing at Pocatello,
Idaho.

[Endorsed]: Filed February 25, 1950.

[Title of District Court and Cause.]

ORDER

The defendants having heretofore filed and presented their motion for more definite statement and the matter having been argued by counsel for the respective parties, and the Court now being advised in the matter,

It Is Ordered that the said motion for more definite statement be and the same is granted and the Plaintiff is allowed ten days to amend the complaint to conform with this order.

Dated June 14, 1950.

CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff and for cause of action against the defendants complains and alleges:

I.

That the plaintiff is now and at all times hereinafter mentioned has been a resident of the State of California.

II.

That the defendant Custer County Bank is an Idaho banking corporation, duly organized and existing under and by virtue of the laws of the State of Idaho and qualified to do business in the State of Idaho, with its principal place of business at Challis, Custer County, Idaho; that defendant Oliver T. Davis is now and at all times hereinafter mentioned was an officer of said corporation, acting in his employment as an agent and employee of said corporation, to wit: Cashier.

III.

That at the time and place hereinafter set forth, the Fourth of July Mining Company was an Idaho mining corporation organized and existing under and by virtue of the laws of the State of Idaho, with its principal place of business at Sunbeam, Idaho.

IV.

That on or about the 22nd day of November, 1946, the said Fourth of July Mining Company

made, executed and delivered to said defendant banking corporation its certain chattel mortgage on personal property, in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), which said mortgage is on record as Instrument No. 9490, 97777 of the records of Custer County, Idaho, filed for record November 25, 1946, in Book 8, Minutes of Mortgages on Personal Property, at page 166, covering the following described personal property, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 New generator and 12 motors, ranging from 30 HP down to 1½ HP;
- Blacksmith shop, complete;
- 1 Pelton wheel, complete, and all miscellaneous tools and fittings;
- All assay equipment;
- 1 Chicago pneumatic compressor, Serial 61879 (8033096);
- 10 Tons of rail;
- 5500 feet of pipe and fittings;
- 1 150 HP Diesel Motor, complete with direct-driven generator.

V.

That thereafter, but some time prior to September 23, 1947, that said defendant banking corporation, by and through its agent, Oliver T. Davis, learned, or was advised, or discovered, that certain property in the above-described mortgage on personal property did not belong to the mortgagors, that is, said Fourth of July Mining Corporation, said property being, to wit: a portion or all of the following described property:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 Blacksmith shop, complete, less anvil;
- 10 Motors, ranging from 30 HP to 11½ HP;
- 1 150 HP Diesel Motor, complete with direct-driven generator;

that said banking corporation thereupon, by and through its agent, Oliver T. Davis, demanded of said mining corporation and its officers immediate payment of said above-described mortgage, and did further advise said mining corporation and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own.

VI.

That after such threat of criminal prosecution by the said defendant banking corporation, by and through its agent, Oliver T. Davis, said mining corporation and its officers entered into negotiations with plaintiff for the loan of the sum of Ten Thousand Dollars (\$10,000.00); that plaintiff, without any knowledge of the facts set forth in paragraph V hereof, offered and agreed to loan said sum to said mining corporation provided said mining corporation would give as security to plaintiff for such loan a mortgage upon all the property that said mining corporation had at said time mortgaged to the defendant bank, together with certain additional property that said mining corporation had mortgaged to one Roy E. Bassett, said property mortgaged to Bassett being as follows, to wit:

One 1941 GMC Truck, Motor No. 27,025,819,

Serial No. 159729A2;

One 200 Amp. Lincoln portable welder.

VII.

That, for the purpose of consummating said transaction, plaintiff came to Challis, Idaho, and with the officers of said mining corporation, and on the 23rd day of September, 1947, went to the defendant bank and its agent, Oliver T. Davis, Cashier; that said bank and its agent, Oliver T. Davis, were engaged by plaintiff and said mining corporation to prepare the papers and handle the escrow and serve as escrow holder in connection with the preparation of the said mortgage for Ten

Thousand Dollars (\$10,000.00), and the disbursement of the sum of Ten Thousand Dollars (\$10,000.00) being loaned by plaintiff to said mining corporation.

That at said time and place the defendant corporation, by and through its agent, defendant Oliver T. Davis, well knew and was informed that the loan was being made by plaintiff to said mining corporation for the purpose of said mining corporation paying off the above-described mortgage obligation of said corporation to the bank; that said banking corporation, by and through its agent, Oliver T. Davis, further knew that the reason that said mining corporation was paying such obligation to defendant bank was that it, the said banking corporation, by and through its agent, Oliver T. Davis, had demanded payment from such mining corporation at once or criminal prosecution would be instituted against the mining corporation and its officers for mortgaging property not belonging to such mining corporation.

That further, and by reason of the fact that said defendant bank, by and through its agent, Oliver T. Davis, was employed and assumed the responsibility of preparing said mortgage, promissory note, assignment of lease agreement, mortgage release and escrow agreement, and was further employed to act as escrow holder, the said defendant bank and its agent, Oliver T. Davis, became fiduciary agents of plaintiff, and thereby were bound and required to advise, disclose, reveal and divulge to said plaintiff their interest in said proposed

loan of Ten Thousand Dollars (\$10,000.00) from plaintiff to said mining corporation, and all information concerning the mortgage of said mining corporation to the defendant bank, and knowledge of the unlawful mortgaging by said mining corporation of property it did not own; that the said defendant bank did not make such disclosures, but accepted such employment as herein set forth.

VIII.

That the defendant banking corporation, by and through its agent, Oliver T. Davis, was on the 23rd day of September, 1947, given the following instructions by plaintiff for the preparation of said mortgage and escrow agreement, to wit:

(a) Prepare a mortgage covering all property described in the mortgage hereinabove described as held by said defendant bank, and covering in addition thereto the property described in the mortgage held by said Roy A. Bassett, as hereinbefore described.

(b) Upon the execution of such mortgage on personal property and a promissory note secured by such mortgage, and the performance of other conditions hereinafter set forth, to pay over the sum of Ten Thousand Dollars (\$10,000.00), delivered by plaintiff to said defendant bank, to the said mining corporation.

(c) To prepare an escrow agreement, by the terms of which said bank was to act as escrow holder and hold an assignment of lease agreement made by said mining corporation

to plaintiff, and the aforesaid promissory note, and to disburse the said Ten Thousand Dollars (\$10,000.00).

(d) To record the mortgage and to prepare and obtain a release of the mortgage held by said defendant bank on the property of the said mining corporation.

IX.

That thereafter the said defendant bank, by and through its agent, Oliver T. Davis, in violation of the aforesaid instructions of the plaintiff and, further, without disclosing to plaintiff its knowledge or that of its agent, Oliver T. Davis, with respect to the mortgage held by it, wherein said mining corporation mortgaged property not belonging to it and, further, without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis, to said mining corporation and its officer, and acting as the fiduciary agent of plaintiff in the preparation of the mortgage and escrow agreement, did prepare such mortgage and did knowingly, fraudulently, and designedly, and with the intent to defraud and deceive plaintiff, prepare such mortgage contrary to the instructions of plaintiff, in the following particulars, to wit:

1. Prepared a mortgage covering the following described property, to wit:

- 1 Compressor, Chicago, 315 cu. ft., with 6-cylinder gas motor;
500 feet of air hose, 1¼ inch;

- 2 Stopers, Ingersoll-Rand, complete w/fittings;
- 1 Jack hammer, Ingersoll-Rand;
- 6 Sets steel for stopers;
- 1 Box diamond points;
- 15 Ton of rail;
- 4 Ore Cars;
 - 5,500 feet pipe and fittings;
- 1 Carriage car;
- 1 Air receiver tank, large;
- 2 Water receiver tanks;
- 2 Knockdown 54-bbl. tanks;
- 2 30-HP motors;
- 2 Wagon drills, Ingersoll-Rand;
- 1 Generator, 123 HP, powered by Pelton wheel, complete;
- 1 Large anvil;
- 20 Rolls tar paper;
- 1 Set pipe cutters and dies;
- 1 Paint spray outfit w/Curtis compressor;
 - Wisconsin motor, mounted on Menterden trailer;
- 1 Mill located on Buckeye mill site, adjacent to Yankee Fork in Custer County, Idaho;

Assay Equipment:

- 1 Rock crusher;
- 1 Braun pulverizer;
- 1 Furnace burner;
- 2 Small butane burners;
- 1 Butane regulator;

which said property did not then and does not

now have a value to exceed One Thousand Five Hundred Thirty-One Dollars (\$1531.00), in said mortgage as prepared by the defendant bank, through its agent, Oliver T. Davis, was the property described on a list furnished said Oliver T. Davis by said mining corporation by and through its agents, which list plaintiff had never been furnished and which the defendant bank, through its agent, Oliver T. Davis, knew had not been furnished to, nor exhibited to, plaintiff.

2. Prepared a mortgage contrary to the instructions of plaintiff, in that the following described property was omitted, to wit:

One 1941 GMC Truck, Motor No. 27,025,819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder;

which property was of a minimum value of Two Thousand Five Hundred Dollars (\$2500.00), and which was the property described in that certain mortgage from the mining corporation to Roy A. Bassett, and was omitted, although defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include such equipment in the mortgage being made and given as security for the loan of Ten Thousand Dollars (\$10,000.00), by plaintiff to said mining corporation.

3. Prepared a mortgage contrary to the instructions of plaintiff, in that the following described property was omitted, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40-HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- Blacksmith shop, complete;
- 1 150-HP Diesel motor, complete w/direct-driven generator;

which property was of a minimum value of Ten Thousand Fifty Dollars (\$10,050.00), which said property was described in that certain mortgage from the mining corporation to the defendant bank, and was omitted, although the defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include all equipment in said mortgage from the mining company to said bank, in the mortgage being made from the mining company to plaintiff, as security for the loan of Ten Thousand Dollars (\$10,000.00), by plaintiff to said mining corporation.

X.

That, further, the said defendant bank, by and through its agent, Oliver T. Davis, well knowing that certain property described and mortgaged in the mortgage held by it from the said mining company did not belong to said mining company, and, further, well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened

said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation, if said mortgage was not paid, did knowingly, fraudulently and designedly, and with the intent to deceive, defraud and mislead plaintiff, and for its own gain and benefit, and although serving in a fiduciary relationship to plaintiff, in the preparation of such mortgage and escrow agreement, and acting as escrow holder, did fail, neglect and refuse to disclose, divulge or reveal to plaintiff such information.

XI.

That the value of property in said mortgage became known to the plaintiff on or about the 1st day of August, 1948, and did not prior to that time know that his instructions to the defendant, Oliver T. Davis, were miscarried until said date and that since the 23rd day of September, 1947, the property listed in said mortgage executed by the defendant, Oliver T. Davis, has since become worthless without any fault on the part of the plaintiff and further that the property so included in said mortgage prepared by the said Oliver T. Davis, was never of a value in excess of One Thousand Five Hundred Thirty-One Dollars (\$1531.00); and further, that the property fraudulently excluded from said mortgage prepared by said Oliver T. Davis was of the value of Twelve Thousand Five Hundred Fifty Dollars (\$12,550.00).

That by reason of not disclosing such previous fraudulent transaction of said mining corporation,

although having actual knowledge thereof, and by violation of the oral instructions of the plaintiff as hereinabove alleged and set forth, and by reason of the receipt of payment in full of its mortgage hereinabove described, by virtue of the Ten Thousand Dollars (\$10,000.00) loan made by plaintiff, the defendant bank, by and through its agent, Oliver T. Davis, did knowingly, wilfully, fraudulently and designedly, and with intent to defraud and deceive, did then and there defraud the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00) and did violate its fiduciary relationship with plaintiff.

XII.

That, by reason of the fraudulent acts and omissions aforesaid of the defendant bank, by and through its agent, Oliver T. Davis, and in reliance thereon, the plaintiff, being in good faith, and without knowledge of said fraudulent acts, and relying upon the good faith of the defendants, was induced to and did pay out, and has been deprived of, the sum of Ten Thousand Dollars (\$10,000.00).

XIII.

That, by reason of the wilful and designed fraudulent acts and deceit of the said defendants in defrauding plaintiff of the sum of Ten Thousand Dollars (\$10,000.00) as aforesaid, plaintiff is entitled to punitive and exemplary damages in the sum of Twenty-Five Thousand Dollars (\$25,000.00).

XIV.

That in addition to the damages aforesaid, by reason of the willful and designed fraudulent acts and deceit of the said defendants in defrauding plaintiff, the plaintiff has been compelled to employ attorneys to prosecute this action in his behalf, and has agreed to pay them a reasonable fee, and that a reasonable fee for the bringing of this action is Three Thousand Five Hundred Dollars (\$3,500.00).

Wherefore, Plaintiff pays for judgment against the above-named defendants as follows, to wit:

1. For the sum of Ten Thousand Dollars (\$10,000.00), principal;
2. For the sum of Twenty-Five Thousand Dollars (\$25,000.00) for punitive and exemplary damages;
3. For the sum of Three Thousand Five Hundred Dollars (\$3,500.00) for attorney fees in said action;
4. For costs of this action and for such other and further relief as to the Court may seem just and proper in the premises.

Dated this .. day of July, 1950.

/s/ HENRY McQUADE,
Attorney for Plaintiff.

/s/ R. DON BISTLINE,
Attorney for Plaintiff.

State of Idaho,
County of Bannock—ss.

Personally appeared before me, Henry McQuade and R. Don Bistline, attorneys in the foregoing action, and being first duly sworn, depose and say as follows: That they have read the contents in this Amended Complaint and according to their best information, belief and knowledge, represent that the facts are true, and that they as attorneys for the plaintiff, Howard M. Courtney, do verify this Amended Complaint on behalf of said plaintiff for the following reason: That the said plaintiff is a resident of the State of California and is presently in the State of Arkansas and is, therefore, unable to sign this Amended Complaint in his own behalf.

/s/ R. DON BISTLINE,

/s/ HENRY McQUADE,

Attorneys for Plaintiff.

Subscribed and Sworn to before me this 17th day of July, 1950.

[Seal] /s/ F. E. TYDEMAN,
Notary Public.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Custer County Bank, an Idaho Banking Corporation, and moves the Court for an order dismissing the above-entitled action and for reasons thereof states:

I.

That the said Amended Complaint does not state facts sufficient to constitute a claim in favor of the plaintiff and against the defendant, Custer County Bank, an Idaho Banking Corporation.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendant, Custer County Bank,
an Idaho Banking Corporation.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the defendant, Custer County Bank, an Idaho Banking Corporation, and moves the Court for an order striking from said Amended Complaint the following:

I.

That part of Paragraph V of said Amended

Complaint, found on page 3 thereof, reading as follows:

“and did further advise said mining corporation and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own.”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

II.

Likewise moves the Court for an order striking from Paragraph IX, as found on page 5, the words:

“without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis,”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

III.

Likewise moves the Court for an order striking from Paragraph X, as found on page 7, the following:

“and further well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation,”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for Defendant, Custer County Bank, an
Idaho Banking Corporation.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Oliver T. Davis, and moves the Court for an order dismissing the above-entitled action, and for reasons thereof states:

I.

That the said Amended Complaint does not state facts sufficient to constitute a claim in favor of the plaintiff and against the defendant, Oliver T. Davis.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendant,
Oliver T. Davis.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the defendant, Oliver T. Davis, and moves the Court for an order dismissing the above-Amended Complaint the following:

I.

That part of Paragraph V of said Amended Complaint, found on page 3 thereof, reading as follows:

“and did further advise said mining corpora-

tion and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own."

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Oliver T. Davis.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Oliver T. Davis.

II.

Likewise moves the Court for an order striking from Paragraph IX, as found on page 5, the words:

"without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis,"

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Oliver T. Davis.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Oliver T. Davis.

III.

Likewise moves the Court for an order striking from Paragraph X, as found on page 7, the following:

“and further well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation,”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Oliver T. Davis.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Oliver T. Davis.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for Defendant,
Oliver T. Davis.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

ORDER

Motion to Strike and Motion to Dismiss having heretofore been filed by each of the defendants in the above-entitled cause and the Court having heard oral argument and having asked for briefs; counsel for the respective parties having filed their briefs and the Court having considered the matter and being advised,

It Is Ordered that the motions be and each of them is hereby overruled without prejudice and the matters raised by the motions will be considered by the Court upon the trial of the cause upon its merits.

Defendants may have twenty days in which to file their answer.

Dated March 13, 1951.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed March 13, 1951.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants and as and for their Answer to the Amended Complaint of the plaintiff herein allege, affirm and deny as follows:

First Defense

I.

That the said Amended Complaint fails to state a claim against the defendants or either of them upon which relief can be granted.

Second Defense

I.

Defendants deny each and every allegation in said Amended Complaint contained, save and except those particular allegations hereinafter specifically admitted.

II.

Admit the allegations of paragraphs II, III and IV.

III.

Answering paragraph V defendants admit that some time prior to September 23, 1947, the defendant Banking Corporation learned, or was advised, that certain of the property described in the said mortgage so held by it, and referred to in paragraph IV, did not belong to the said mortgagor, and admits that upon so learning that fact, the said note being due, requested immediate payment of

the moneys due it, as evidenced by said note, the payment of which was secured by said mortgage, but denies that said Mining Company and its officers were advised at that time, or at any other time, that if payment was not made at once criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers for mortgaging said property to which it did not have title, or which it did not own.

IV.

Answering paragraph VI your defendant denies the allegations therein contained.

V.

Answering paragraph VII your defendants deny each and every allegation therein contained, and state the facts to be that on or about the 23rd day of September, 1947, the said officers of the said Fourth of July Mining Company came into the office of the defendant Custer County Bank, a corporation, at which time they were accompanied by the said plaintiff Courtney, and that at that time said officers of the said Fourth of July Mining Company, in the presence of Courtney, advised the said defendant, Oliver T. Davis, that said plaintiff Courtney was going to make said corporation a loan in the sum of \$10,000.00 and that out of such sum the said Mining Company was going to pay the amount due the bank, and that such officers at such time requested the defendant, Oliver T. Davis, as an individual, to prepare a mortgage covering

certain property as shown on a list of property which was handed to the said Oliver T. Davis, and that the said Oliver T. Davis did prepare a mortgage covering the property so set forth in such list, and that at all times in said conversation between said officers of the Mining Company and the said Oliver T. Davis it was stated that the said Custer County Bank would be paid the amount of money due it out of the moneys that were being loaned by the plaintiff Courtney to said Mining Company, and that said plaintiff at all times was present during the times of such conversation and heard such conversation and looked over said mortgage after the same was drafted. That after said mortgage was completed the said officers of said Mining Corporation directed some additional property be added, which was added in the presence of the plaintiff Courtney.

VI.

Answering paragraph VIII deny the allegations therein contained and state the facts to be that the said officers of the said Fourth of July Mining Company, a corporation, in the presence of the plaintiff Courtney, gave to the said Oliver T. Davis, one of the said defendants herein, a list of the property to be mortgaged, and asked that a mortgage be prepared, and that a mortgage was prepared in accordance with the request of said officers, covering the property contained on said list, and after the same was prepared at the request of the officers of said Mining Corporation additional prop-

erty was added, and that the only directions that your said defendant, Oliver T. Davis, ever received were as herein stated, together with the additional instructions to record said mortgage, and that at that time and place there was deposited to plaintiff's account and then to the account of the Fourth of July Mining Company the sum of money so loaned by the said Courtney to the said Mining Company, and the said Mining Company issued a check to said defendant bank in payment of its said indebtedness, and that escrow papers were drafted in accordance with the directions of said parties, and that at all times the said defendants, and each of them, have carried out said escrow directions.

VII.

Answering paragraphs IX and X your defendants deny the allegations in each paragraph contained.

VIII.

Answering paragraph XI defendants deny the allegations therein contained and state that the said property as described in said mortgage was of a value far in excess of the amount of the said mortgage indebtedness.

IX.

Answering paragraph XII defendants deny the allegations therein contained.

X.

Answering paragraph XIII your defendants deny that by reason of the willful and designed fraudu-

lent acts and deceit of said defendants in defrauding plaintiff of the sum of \$10,000.00 as aforesaid, plaintiff is entitled to punitive and exemplary damages in the sum of \$25,000.00, or any other sum, or any other amount, and state that at no time, or at all, did the said defendants, or either of them, ever practice any willful or fraudulent acts or deceit upon said plaintiff, and deny specifically that he was damaged in the sum of \$10,000.00 or any other sum, or at all.

XI.

Answering paragraph XIV your defendants deny the same.

Affirmative Defense

I.

Defendants allege that in accordance with the allegations in paragraph XI plaintiff admits that he had notice of the fact that his alleged instructions had not been carried out and that he did not have the property described in his said mortgage that he alleges was to be included therein; likewise plaintiff alleges that on or about such date he knew of the fact that the said property, as he alleges, was not of sufficient value to cover his indebtedness, and that notwithstanding such knowledge he, the said plaintiff, refrained from commencing this action until the 13th day of January, 1950, and that in the meantime the said property that he did have the mortgage upon was wasted, destroyed, moved away or dispersed, and that considerable of it was sold for taxes, and that he,

by his own laches deprived himself of his said security, and that he has thereby been guilty of laches and such in equity barred the plaintiff from maintaining this action.

Second Affirmative Defense

I.

Plaintiff, after making said loan to said Fourth of July Mining Company, and as and when the same became due made an extension of the same and received a consideration therefor and accepted certain properties as a consideration for granting such extension, and by reason of the facts of the said plaintiff in so doing, as herein set forth, he, the said plaintiff, is estopped from asserting any claim against said defendants or either of them.

Third Affirmative Defense

I.

That the said security so held by the said plaintiff was of adequate and of sufficient value that if it had been preserved and taken care of that it would have, upon forced sale, brought sufficient money to retire the indebtedness due said plaintiff, but that said plaintiff was advised that the said company was not active, and knew, or should have known, that the said property was being wasted, subject to the elements and was not being cared for, and that the same would become lost, stolen or carried away, and that he took no affirmative actions to protect himself in any manner whatso-

ever, and that the said taxes were permitted to accumulate on said property and that a writ of distraint for delinquent taxes was issued and that a considerable part, if not all, or at least that property that could be found, was sold, as is commonly referred to, for taxes, and that if plaintiff was damaged in any sum of money whatsoever such damage was occasioned by his own acts of negligence and not otherwise.

Fourth Affirmative Defense

I.

Defendants and each of them allege that notwithstanding that the said plaintiff alleges he became aware of the conditions existing as to the value and the type of and kind of property that was in his said mortgage, the said plaintiff did not take any steps or any action to protect himself, and that the said property was subject to assessment under the laws of the State of Idaho, and that taxes on a considerable portion thereof, if not all of the same, were permitted to become delinquent, and that a writ of distraint was issued by the proper authorities of the County of Custer, State of Idaho, and that said property was disposed of under the provisions of the laws of the State of Idaho relating to the sale of property where taxes are permitted to go delinquent, and that the said property became of no value to said plaintiff by reason of the failure of the said Fourth of July Mining Company and the said plaintiff to properly protect said security.

Wherefore, Defendants, and each of them, having fully answered, pray that they may be dismissed with their costs and that the said plaintiff take nothing by reason of said Amended Complaint.

/s/ O. R. BAUM,

Residing at Pocatello, Idaho,

/s/ RUBY Y. BROWN,

Residing at Pocatello, Idaho,

Attorneys for Defendants.

[Endorsed]: Filed April 10, 1951.

United States District Court for the District
of Idaho, Eastern Division
No. 1598

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,
Defendants.

VERDICT

We, the jury in the above-entitled cause, find for the defendants Custer County Bank, an Idaho Banking Corporation, and Oliver T. Davis, and against the plaintiff.

/s/ MRS. ALBERT McINTYRE,
Foreman.

[Endorsed]: Filed May 17, 1951.

United States District Court for the District
of Idaho, Eastern Division

No. 1598

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,
Defendants.

JUDGMENT

This cause came on for trial before the Court and jury, both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for the defendants.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff take nothing upon his complaint herein, and that the defendants have and recover from the plaintiff their costs and disbursements incurred herein, taxed in the sum of \$218.90.

Witness the Honorable Chase A. Clark, Judge of said court, and the seal thereof, this 17th day of May, 1951.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Howard M. Courtney, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 17, 1951.

/s/ HOWARD M. COURTNEY,
Plaintiff and Appellant.

/s/ R. DON BISTLINE,
Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed June 13, 1951.

[Title of District Court and Cause.]

MOTION AND ORDER

Comes now the above-named plaintiff by and through his attorney, R. Don Bistline, and respectfully requests additional time in the amount of 50 days in which to perfect appeal in the above-entitled matter, and respectfully represents that since the filing of said appeal said transcript has not been prepared, and further that counsel has been ill for a period of three weeks.

Dated this 17th day of July, 1951.

/s/ R. DON BISTLINE,
Attorney for Plaintiff and
Appellant.

ORDER

Upon the reading of the foregoing motion, and good cause appearing therefor,

It Is Hereby Ordered That Plaintiff be and he is hereby granted 50 additional days in which to perfect appeal in said above-entitled matter to the Circuit Court of Appeals for the Ninth Circuit.

Dated July 18th, 1951.

/s/ CHASE A. CLARK,
U. S. District Judge.

[Endorsed]: Filed July 18, 1951.

United States District Court, for the District of
Idaho, Eastern Division

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,
Defendants.

TRANSCRIPT

This matter came on for trial before the Honorable Chase A. Clark, United States District Judge, sitting with a jury at Pocatello, Idaho, on May 17th, 1951

APPEARANCES

HENRY McQUADE, Esquire,
Pocatello, Idaho.

R. DON BISTLINE, Esquire,
Pocatello, Idaho,

Attorneys for the Plaintiff.

O. R. BAUM, Esquire,
Pocatello, Idaho.

RUBY Y. BROWN,
Pocatello, Idaho,

Attorneys for the Defendants.

Bay 17th, 1951, 10:00 o'Clock A.M.

(Jury called and sworn.)

(Opening statement by Mr. Bistline.)

Mr. Bistline: We would like to call Mr. Davis for examination under the statute.

The Court: Very well.

OLIVER T. DAVIS

called as a witness by the plaintiff, for cross-examination under the statute, after being first duly sworn testifies as follows:

Cross-Examination

By Mr. Bistline:

Q. You are the cashier of the Custer County Bank?
A. Yes, sir.

(Testimony of Oliver T. Davis.)

Q. Were you cashier of the Custer County Bank in September, 1947? A. Yes, sir.

Q. How long before that had you been cashier?

A. Since approximately the first of March, 1947.

Q. You are familiar with the Fourth of July Mining Company? A. Yes, sir.

Q. At that time the Mining Company had made a loan from the bank? A. Prior to that time.

Q. Do you know the amount of that loan?

A. At what time?

Q. At the time the Mining Company first made it? A. \$5,000.00.

Q. And was that renewed?

A. That was in July of 1946 and was cancelled and a new loan for a larger amount made, I believe in October or September of 1946. The first loan was cancelled and the mortgage cancelled and a new loan made some three months after the first one.

Q. And what was the amount of the new loan?

A. That was \$6,000.00.

Q. The Bank took a mortgage and security for the loan on property of the mining company?

A. The second loan?

Q. Yes. A. Yes, sir, they did.

Q. Did you subsequently discover that some of the mortgaged property didn't belong to the Mining Company?

Judge Baum: That is objected to, it is not peculiarly within the knowledge of the witness and I understand he is on cross-examination.

(Testimony of Oliver T. Davis.)

The Court: I think he may answer, the rule is not just as the rule in the State Court.

A. I was told that the property on the mortgage did not belong to the Fourth of July Mining Company.

Q. When were you told that?

A. It was in the spring of 1947, the late spring, it was probably May or June.

Q. Were you told what property did not belong to the Mining Company? A. Yes, sir. [2*]

Q. What property was that; that is, the property in the mortgage?

A. I cannot at this time list that property correctly but it was certain property—mineral mill machinery which was in the building which I understood was the property of the company. There were certain items, flotation cells, a ball mill, and a crusher—I have a list of that property but I cannot give it to you from memory right now.

Q. Do you have that available?

A. Yes, I have it in the files somewhere.

Mr. Bistline: May the witness get that list, if the Court please.

The Court: Yes, he can refresh his memory from any list that he has.

A. This is a note that I made at the time that I was informed about this property on our mortgage, these are my original notes.

Q. You mean after you had taken the mortgage?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Oliver T. Davis.)

A. The mortgage was made in October, 1946, and this was the following spring when one of the parties who claimed to own this property came into the bank and told me that he and his partner owned this property—there were two crushers, a ball mill, a three cell flotation machine, and a one cell flotation machine.

Q. Who were the parties who advised you of their ownership of the property?

A. Troy Becker. [3]

Q. Did you verify that fact?

A. I had no means of verifying it—I had no access to any documents which would show it. However, Mr. Becker displayed to me a contract for the sale of certain items to the Fourth of July Mining Company and these documents which he showed me listed these items that he reported to me that had never been paid for, that they had never completed the payment under this purchase agreement, and that therefore it didn't belong to the mining company but to him and his associate.

Q. And was his associate Ream Snyder?

A. Yes, sir.

Judge Baum: We object to—I will withdraw that objection—you may go ahead.

Q. Upon receiving that information what action did you take with respect to the Fourth of July Mining Company?

A. We wrote to Mr. Johnson who was an officer of the company and requested him to come to the bank; that I had received some information relative

(Testimony of Oliver T. Davis.)

to the property mortgaged and that I would like to talk to him.

Q. Did Mr. Johnson come in? A. Yes, sir.

Q. And then what happened?

Judge Baum: Now I am sure this is not peculiarly within the knowledge of this witness. [4]

The Court: I understand the rule in this Court is somewhat different and I have said so. I understand that the rule in the State Court does not apply here and that you can call a witness regardless of whether the information is in the hands of other people. I think this conversation would be entirely immaterial at this time. I don't know what he will testify to, but if there is no further objection I will let him answer.

Judge Baum: I do object to its being immaterial and hearsay.

The Court: The objection is sustained.

Mr. Bistline: One of the purposes of this is that we have alleged that there was a threat made by the bank to some member of the corporation——

The Court: That would have nothing to do with your client. After it was discovered that the mortgage was not on property owned by the company I don't think that it would be material at this time. I should also instruct the jury to disregard any remarks of counsel and the court in ruling at this time that those remarks should go out, and the jury should get no inference from any remarks of counsel that any threats were made by anyone to or against anyone.

(Testimony of Oliver T. Davis.)

Q. Following this discovery what effort did the bank make to collect the mortgage? [5]

A. They had made efforts to collect on the mortgage prior to that time.

Q. Had the bank attempted foreclosure?

A. The bank never attempted foreclosure on that mortgage.

Q. As cashier of the bank did you make any evaluation of the property that had been mortgaged to you?

A. I wasn't employed by the bank at the time the mortgage was made—to answer your question, I did not.

Q. At the time you attempted to collect the loan did you make any evaluation of the security?

A. I did not.

Q. Are you familiar with the security?

A. What do you mean?

Q. Do you know what the security consisted of and the probable value?

A. I had the property as listed on the mortgage which was held by the bank at the time that I assumed the position with the bank. I do not have a personal knowledge of that equipment with a very few exceptions. I am not qualified to state the value of the mining machinery. At that time I did not have any personal knowledge of either the equipment or a fair valuation of the equipment; all I had was a financial statement placed on file as is customary when a loan is made.

Q. From the time of the discovery that property

(Testimony of Oliver T. Davis.)

was mortgaged to you that did not belong to the Fourth of July Mining Company, [6] the only effort you made was to collect the loan?

A. That is correct; this loan—at the time I discovered they were already considerably past due, I had previously requested payment as a past due note. I continued to press for collection of the loan since it was overdue. The matter of courtesy to our borrower the loan had been renewed past its due date.

Q. As cashier of the bank did you consider that a bad loan?

Judge Baum: That is objected to as immaterial.

The Court: The objection is sustained.

Q. Had you ever met Mr. Courtney before the day the loan was made? A. No, sir.

Q. What time did Mr. Courtney come to the bank? A. I think it was about noon.

Q. And how long was he there?

A. Well, there were several in the party with Mr. Courtney. Several of them; that is, various ones came in and went out. I would say that Mr. Courtney and most of the party were there for a period of about two or two and one-half hours.

Q. Now, Mr. Davis, Mr. Courtney and the Mining Company came to you to prepare papers in connection with a new loan?

A. Mr. Courtney came, Mr. Haygood, Bassett, and Johnson of the Fourth of July Mining Company that I was acquainted with.

(Testimony of Oliver T. Davis.)

Q. At that time you were requested to prepare papers for a new loan? [7]

A. After the customary introduction and explanation, yes.

Q. At that time you agreed with Mr. Courtney to act as the escrow holder in connection with the new loan?

A. We were requested to act as escrow holder and we accepted.

Q. Was an escrow agreement prepared at that time? A. Yes, sir.

Q. Now, then, handing you what has been marked as Plaintiff's Exhibit No. 1, I will ask you if that is the escrow agreement or one of the copies of the agreement prepared at that time?

A. Yes, I believe that is the Grantor's copy of the escrow agreement prepared at that time—it appears to be.

Q. Is that your signature?

A. My signature appears twice.

Q. Does it appear as accepting the escrow agreement? A. For the bank, yes.

Q. The bank did accept that responsibility?

A. As escrow holder.

Q. For both parties concerned?

A. Yes, sir.

Q. And for the Mining Company, is that right?

A. Yes, sir.

Mr. Bistline: At this time we offer in evidence Plaintiff's Exhibit No. 1.

Judge Baum: May we have the original? [8]

(Testimony of Oliver T. Davis.)

Mr. Bistline: I have never seen the original.

Judge Baum: Then may we have the deposition as taken in the matter?

The Court: The deposition may be published, and it is so ordered.

Mr. Bistline: We have no objection to that.

Judge Baum: We have no objection to this exhibit.

The Court: It may be admitted.

Q. During the time that Mr. Courtney was present at the bank that day, that is, during the time that the agreement was prepared or at any time did you ever advise Mr. Courtney that the bank had property on the mortgage that did not belong to them, that had been mortgaged to the bank as property of the Fourth of July Mining Company?

Judge Baum: We object to that as immaterial.

The Court: That objection is sustained.

Q. Did you ever advise Mr. Courtney that the bank had a bad loan?

Judge Baum: That is objected to as incompetent, irrelevant and immaterial.

The Court: That objection is sustained.

Q. Did Mr. Courtney give you any instructions concerning the preparation of papers in connection with this loan? A. Very little, if any.

Q. What instructions did he give you? [9]

A. The only specific instruction that I recall at this time that he gave was after the preparation of the papers, he requested that I ascertain at the

(Testimony of Oliver T. Davis.)

court house through the lien certificates that the property was clear.

Q. Did you—or rather, did Mr. Courtney tell you at that time that he wanted a mortgage on all of the property of the Fourth of July Mining Company? A. No.

Q. Did he tell you at that time that he wanted a mortgage on the property of the Fourth of July Mining Company—the same property that the bank had on their mortgage? A. No, sir.

Q. You prepared a note and mortgage?

A. Yes, sir, a note and mortgage.

Q. And did you prepare any other instruments?

A. An escrow agreement.

Q. Did you prepare an assignment of the mining claims or leases? A. I did not.

Q. Did Mr. Courtney request an assignment of the claims as part of the security?

A. I don't know whether he requested that or not. All that I know is that I was requested to prepare such an assignment and that I refused to do so.

Q. Do you know who prepared the assignment?

A. I do not. [10]

Q. Was such an assignment prepared?

A. Yes, and it is a part of the documents held in escrow and was listed on that copy of the escrow agreement that I had in my hand.

Q. When was the escrow papers prepared?

A. On the same day as the rest of them, the same afternoon.

(Testimony of Oliver T. Davis.)

Q. Were any other papers required to be in escrow?

A. The note, assignment, mortgage, and a copy of the extract of the minutes of the board of directors of the Fourth of July Mining Company, and the corporate resolution authorizing the President and the Vice-President to make the transaction. I think there was also placed in escrow with the assignment and note for \$10,000.00, the mortgage which was not listed as one of the documents in the escrow.

Q. Did you prepare the mortgage?

A. Yes, I did.

Q. Where is the mortgage now?

A. It is on file in the office of the County Recorder of Custer County.

Q. The original is in your file? A. Yes.

Q. Did you make a copy of the mortgage at the time you prepared it? A. Yes, sir, one copy.

Q. Where is that copy? [11]

A. I think my counsel would have to answer that. I believe it is with these documents accompanying the deposition of Mr. Johnson, but I am not sure.

Q. So far as you know it would be with the deposition. Did you have possession up to the time that counsel took it?

A. Yes, up to the time that I gave it to counsel.

Q. Did you ever furnish Mr. Courtney with a copy of that mortgage?

A. I cannot say for sure but I think not.

(Testimony of Oliver T. Davis.)

Q. Did he request a copy?

A. Not to my knowledge.

Q. Were you to furnish him a copy as per your understanding? A. Not to my knowledge.

Q. Isn't it a fact that about August, 1948, Mr. Courtney came to the bank and requested a copy?

A. Mr. Courtney came to the bank in August, 1948. I do not remember his requesting a copy because if he had I could have furnished him one at that time.

Q. Did you have a discussion with Mr. Courtney at that time regarding the mortgage?

A. I think that he asked to look at it.

Q. And did he look at it?

A. Yes, I think he did.

Q. Did he direct your attention to the fact that certain items were not in that mortgage?

A. He did not. [12]

Q. A 130 horse power diesel motor?

A. No.

Q. Among other papers turned to you at the time of this escrow, was there a check by Mr. Courtney? A. That is correct.

Q. A check for how much?

A. A check for \$10,000.00.

Q. Did Mr. Courtney give instructions in regard to that?

A. Mr. Courtney endorsed the check and I deposited it to his account.

Q. Did he furnish you with another check payable to the Fourth of July Mining Company?

(Testimony of Oliver T. Davis.)

A. He did not; he gave the check to the officers of the Mining Company.

Q. It was not placed in your hands?

A. It was placed in the hands of the Fourth of July Mining Company.

Q. At what time?

A. At the time Mr. Johnson gave me a \$10,000.00 draft by the Bank of America.

Q. Do you know to whom the check was delivered—to which officer of the Fourth of July Mining Company?

A. No, I don't. It was simply handed to one of them and they endorsed it and it was given to me to deposit to the credit of the Fourth of July Mining Company. [13]

Q. On that date? A. Yes, sir.

Q. You are positive that you never had that in your possession except as it cleared the bank?

A. Which check is that?

Q. Payable to the Fourth of July Mining Company? A. The bank had it for clearance.

Q. But not otherwise? A. That is right.

Q. Are you positive that check was not turned over to you to be held until all the papers were in the file——

A. No, sir, the check was handed to me for deposit. It was not cleared for two days, and such check was not held as a part of the escrow; the check was held as a cash item for collection and was held in the general accounts of the bank until we could get clearance from the issuing bank that the

(Testimony of Oliver T. Davis.)

draft was payable at, at which time the check was entered on the deposit to Mr. Courtney's account which was the second day thereafter.

Q. There may be some misunderstanding, Mr. Davis. You received a draft from Courtney deposited to his account? A. Yes, sir.

Q. That was one check for \$10,000.00?

A. Yes, sir.

Q. That was a cashier's check?

A. The draft on a Seattle bank, I believe, being a branch of the Bank of America in California. [14]

Q. That was deposited to Mr. Courtney's account?

A. He was not given immediate credit. We held the check—we held the draft until we received wire clearance on it, so it was in the bank's possession until the Bank of California cleared it by wire.

Q. And then a check to the Fourth of July Mining Company as distinguished from the draft was given to the Mining Company?

A. Yes, sir.

Q. And they deposited it? A. Yes, sir.

Q. And it was held until you had clearance on the draft?

A. Yes, sir, because Mr. Courtney's check was dependent on his bank honoring that draft.

Q. And at this time the bank received payment of their \$7500.00 loan? A. Yes, sir.

Q. As soon as the draft was honored?

A. The check was made out at the same time as Mr. Courtney's check to the company; it likewise

(Testimony of Oliver T. Davis.)

had to be held for the clearance—depending on the clearance of the draft.

Q. One of the instructions by Mr. Courtney was to check the county records to ascertain if there were any liens against the property being mortgaged? A. That is correct. [15]

Q. When did you accomplish that?

A. I would have to check for the exact date. However, I think it was the following day which would be the 24th. I think I did that the next day.

The Court: Do you have the lien certificate?

Judge Baum: Yes.

A. It was either the next day or the day following that.

Judge Baum: I think it was the same day.

Q. And you thereafter advised Mr. Courtney that you had complied with those instructions?

A. Yes, I did.

Q. Handing you what has been marked as Plaintiff's Exhibit No. 2, I will ask you if that is addressed by you to Mr. Courtney? A. Yes, sir.

Q. And that is your signature?

A. Yes, sir.

Mr. Bistline: At this time we offer this instrument as Plaintiff's Exhibit No. 2.

Judge Baum: We have no objection.

The Court: It may be admitted.

Q. In connection with this transaction did the parties remain in the bank until after banking hours that day?

A. Well, it was close to the close of our day. I

(Testimony of Oliver T. Davis.)

would not say that it was after banking hours—don't think that it was. [16]

Q. They arrived about noon?

A. Yes, about or shortly after noon.

Q. When did Mr. Courtney leave, if you recall?

A. Well, it was at the time the proceedings were all finished. That would have been probably two o'clock—yes, it would be in that neighborhood. That is a little vague, and it is a vague statement because I have no definite recollection of the time.

Q. Did Mr. Courtney leave before the other parties involved left; that is, the officers of the Fourth of July Mining Company?

A. I cannot remember in what order the parties left. However, Mr. Courtney expressed a desire to be gone and he possibly could have gone before the rest but I don't remember.

Q. Had all the business been transacted before Mr. Courtney left?

A. Other than filing the mortgage. The escrow, the mortgage, the note and the assignment had been made and signed.

Q. They were all made while Mr. Courtney was present?

A. They were signed while he was present.

Q. That had been completed? A. Yes, sir.

Q. None were signed in blank? A. No, sir.

Mr. Bistline: I think that is all. [17]

Judge Baum: I assume that in our case we can cover this same territory in a more thorough manner?

The Court: Yes, you may do that.

Judge Baum: Then there are no questions.

HOWARD M. COURTNEY

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bistline:

Q. What is your occupation?

A. I am raising cattle right now.

Q. Where do you reside, Mr. Courtney?

A. In Arkansas.

Q. Whereabouts in Arkansas?

A. Dardenelle, Arkansas.

Q. At the time of making this loan to the Fourth of July Mining Company where did you reside?

A. At Los Angeles, California.

Q. Now, what was your first connection with the mining company?

A. Some people kept insisting that I come up and look at it and invest in it, and I finally did look at it.

Q. When did you come to Idaho?

A. It must have been around July of 1947.

Q. Where did you go on that trip?

A. I went to Challis and to Sun Beam.

Q. Did you inspect the Fourth of July Mining property? [18]

A. Yes, sir.

Q. Will you tell us what mining equipment you observed at the mine?

(Testimony of Howard M. Courtney.)

A. Well, there was a mill, the customary ball mill, flotation machines, motors, crushers, and other machinery. When I went to the mine I saw a couple of cars and we visited another mine called Lucky Boy, and they had a considerable amount of rails and pipe and air-compressors that they said was a part of their equipment.

Q. Who did you make that trip with?

A. With Ed Haygood.

Q. What capacity did he hold with the mining company?

A. I don't recall at that time but he later became president.

Q. State whether or not there was equipment to operate a mine there?

Judge Baum: We object to that as immaterial.

The Court: Yes, I think it is, in fact, I don't see how the bank could be affected by this trip in any manner. That objection will be sustained.

Q. Subsequent to that trip to Idaho did members of the mining company contact you about making a loan?

A. Yes, after I was up here and I said that I was not interested, and they came down there.

Q. Down where? A. Down to Los Angeles.

Q. And did they see you? A. Yes, sir.

Q. And was there a discussion?

A. Yes. [19]

Q. What was discussed there?

Judge Baum: We object to that as incompetent, irrelevant and immaterial.

(Testimony of Howard M. Courtney.)

The Court: I cannot see how the bank could be affected by anything that took place between these parties.

Q. At that time did the matter of the bank's mortgage come up?

Judge Baum: That is objected to as being immaterial.

The Court: The Court has ruled on this matter of the conversation, this objection is also sustained.

Q. Mr. Courtney, did you go to Challis and make a loan to the mining company? A. Yes.

Q. When did you make that trip to Challis?

A. That was in September of 1947.

Q. How did you make the trip?

A. By car.

Q. Will you tell the jury just how long it took you to get there from Los Angeles?

A. Twenty-three hours.

Q. From Los Angeles? A. Yes, sir.

Q. Who was with you on that trip?

A. Paul Mills.

Q. Where is he?

A. I understand he is in Oklahoma City. [20]

Q. Who else was with you?

A. My mother.

Q. What time did you arrive in Challis?

A. About 12:00 o'clock noon.

Q. And where did you go?

A. To the bank.

Q. Who went to the bank with you?

(Testimony of Howard M. Courtney.)

A. Ed Haygood, Mr. Johnson, Mr. Bassett, Pee Wee Morton, and Paul Mills.

Q. Did you meet Mr. Davis at that time?

A. Yes, sir.

Q. Did you ever meet him before that time?

A. No, sir.

Q. For what purpose did you go to the bank?

A. I went there to secure his services to transact the business of the loan and to see that everything was there and in the mortgage.

Q. Did you talk to Mr. Davis?

A. Yes, sir.

Q. Did you secure his services?

A. Yes, sir.

Judge Baum: We object to that as a conclusion of this witness.

The Court: Yes, it is a conclusion, the conversation between him and Mr. Davis is all that would be material in any sense. [21]

Q. At the bank did you have a conversation with Mr. Davis concerning this loan? A. Yes, sir.

Q. Who was present?

A. All of those that I mentioned, there was Paul Mills, Pee Wee Morton, Mr. Haygood, Mr. Bassett, Johnson and Mr. Davis.

Q. Will you tell the jury what that conversation was that you had with respect to this loan?

A. Well, I told him that I had agreed to loan them some money if I got the right security, and I gave him the money and told him to get the security.

Q. What did you tell him?

(Testimony of Howard M. Courtney.)

A. I told him to put an exact copy of their mortgage together with the trucks, the diesel engine, and to be specific about the diesel engine and the direct driven generator that I never saw that was on his mortgage.

Q. Had you seen the mortgage held by the bank?

A. Yes, I had seen a copy.

Q. You knew what property was on the mortgage?

A. Yes, sir.

Q. Had you seen that property?

A. Yes, I had seen it except the 150 horse power diesel motor.

Q. When you gave these instructions or directions to Mr. Davis, what did Mr. Davis say to you?

A. He said "O. K., we will fix it."

Q. Did he say anything further? [22]

A. He said "We will attend to it." We asked about the pay and the mining company said they would pay for his services.

Q. As escrow holder?

A. Yes.

Q. Did he prepare the escrow agreement at that time?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

Q. Did you deliver a check at that time?

A. Yes, sir.

Q. For how much?

A. For \$10,000.00.

Q. Was that a check or a draft?

A. A draft.

Q. To whom was that delivered?

A. To Mr. Davis.

Q. In what manner?

(Testimony of Howard M. Courtney.)

A. I handed it to him and told him, "here it is," and what to do with it. He said, "I cannot do it that way." He said that I would have to deposit it and I said, "Why?" and he said, "that is the way to do it," and I said "O.K. but I don't see why you can't deposit it when the papers are made up," and he told me to make another check to the Fourth of July Mining Company or he made it. Anyway, I signed it. I was pretty sleepy and I supposed he was responsible for all that he was doing. [23]

The Court: Mr. Witness, you will just answer the question and not make any argument at this time as to what you supposed; just answer counsel's questions.

Q. Handing you Plaintiff's Exhibit No. 3 I will ask you if that is the check that you signed, payable to the Fourth of July Mining Company?

A. Yes, sir, it is.

Q. Who made this check out?

A. I think that I did but I don't remember.

Q. To whom was this delivered?

A. To Mr. Davis.

Q. And that is the gentleman sitting here?

A. That is right.

Q. Did you give any instructions to Mr. Davis concerning this check?

A. Yes, to hold it until all these things were on the mortgage and then he was to check the record over and see that there was no liens against that, and that they owned all of these things.

(Testimony of Howard M. Courtney.)

Q. Is there anything on this check now that was not on it at the time you made it out?

A. I don't notice any.

Q. There is the bank's perforation?

A. Yes, and this statement here (indicating).

Mr. Bistline: We offer this in evidence at this time.

Judge Baum: May I ask a question? [24]

The Court: Yes, you may do that.

Judge Baum: You noticed the endorsement, "Fourth of July Mining Company by E. B. Haygood"?

A. Yes, sir, I do.

Judge Baum: Did you hand it to Mr. Davis or to a mining company officer?

A. To Mr. Davis.

Judge Baum: I have no objection to this.

The Court: It may be admitted.

Q. Now, to your best recollection how long were you in the bank that day transacting this business?

A. Possibly one hour, not over an hour.

Q. What papers were prepared, if you know, while you were present?

A. The escrow agreement was the only one that was completed. They started on the assignment of the lease; I wasn't too interested. I gave him the instructions how to handle it, and as soon as I got the escrow agreement, that was all that I was interested in and I left.

Q. You left? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Had the mortgage been prepared?

A. No, sir.

Q. Had the lease assignment been prepared?

A. Well, there was kind of a draft but not signed. I am sure of that; they were trying to draft it, and they had drafted [25] one that was satisfactory to me and I was not too much interested——

Judge Baum: Why don't you just answer the question, Mr. Witness.

The Court: Yes, this is not a discussion, Mr. Courtney, between you and the other parties. Just answer the questions that are asked.

Q. During the time that you were in the bank did the banker, Mr. Davis, or anyone ever submit to you a list prepared of the property to be mortgaged to you? A. No, sir, they did not.

Q. Did you know of the existence of such a list?

A. No, not any more than the list that I told them to put on it, the mortgage. I knew that there was that list, that is the only list that I ever heard about.

Q. Were you ever furnished with a copy of such list? A. No, sir.

Q. Had the mortgage been prepared as of the time you left the bank?

Judge Baum: We object to that; it has been asked and answered.

The Court: Yes, it has been answered. I believe he stated what had been prepared.

Q. If you know, had the officers of the corporation left at the time you left the bank?

(Testimony of Howard M. Courtney.)

A. Not all of them. There was a considerable number in and out. I went out with Paul and we got in the car and left.

Q. Did you return to the bank that day? [26]

A. I never saw the bank again for over a year.

Q. Now, Mr. Courtney, did you ever receive a copy of the mortgage, or the mortgage itself?

A. I received a copy.

Q. When did you get that copy?

A. Along about August, 1948.

Q. Where did you get that copy?

A. At the Bank.

Q. From whom did you get that copy?

A. Mr. Davis.

Q. Where was that?

A. That was at the Challis bank.

Q. Handing you what has been marked as Plaintiff's Exhibit No. 4, I will ask you if that is the copy which you received from Mr. Davis?

A. Yes, it seems to be the copy I received that day.

Judge Baum: Where is the rest of this?

A. That is all of it.

Judge Baum: Did you notice that the seal was partially on this rider—do you mean that you didn't get the additional part of this rider?

A. No, sir, that is all there was.

Judge Baum: We have no objection to this.

The Court: Are you offering it, Mr. Bistline?

Mr. Bistline: We do offer it, yes, sir.

(Testimony of Howard M. Courtney.)

The Court: Then it may be admitted. [27]

Q. Did you have Mr. Davis certify this as being a true copy?

Judge Baum: It shows—it speaks for itself, and we object to this question.

The Court: The objection is sustained, the exhibit is admitted and it does speak for itself.

Q. Do you recall when in August it was that you obtained this copy of the mortgage?

A. No, I don't remember the exact date.

Q. At the time you received this from Mr. Davis, did you discuss the mortgage with him?

A. Yes, I asked why the stuff wasn't on there that was supposed to be there.

Q. Where did that take place?

A. That was in August.

Q. Where? A. At the Challis Bank.

Q. And who was present?

A. Mr. Davis and myself.

Q. And what happened at that time?

A. Well, I asked for a copy and he said that I couldn't have it, that it was held in escrow, and I asked for a copy, and he very reluctantly gave it to me. I saw that I didn't have the property on it and I asked what about it.

Q. What property wasn't on it?

A. The ball mill, the flotation machine, the two rock crushers, and the 150 horse power diesel with the direct driven generator. [28]

Q. And what did Mr. Davis say about those items?

(Testimony of Howard M. Courtney.)

A. Well, he said they must have given him a different list.

Q. And what did you say?

A. Well, I said, "We will see what is the matter, that is not the way that it is supposed to be."

Q. Was anything further said that day?

A. No, I didn't feel like talking very much to him.

Q. Now, tell the jury what items are not on this mortgage that you believed would be mortgaged to you?

A. Two crushers, a large ore crusher and a fine ore crusher, the ball mill, and a three-cell flotation machine and a single-cell flotation machine and 150 horse power diesel with a direct driven generator, an army truck—I don't know too much about the brands——

The Court: Just answer the question and don't volunteer any information as to what you might understand.

A. This army truck and a welding machine is what I recall now as being off the mortgage that should be on it.

Q. Had you seen any of this property at the mine?

Judge Baum: The question has been answered, and we object to it as repetition. I believe he did describe what he saw at the time.

The Court: Yes, I don't think it would be material here anyway.

Q. Did Mr. Davis, at the time you obtained a

(Testimony of Howard M. Courtney.)

copy of this mortgage, [29] tell you why those items were not on your mortgage?

A. He said that they must have given him a different list.

Q. And did he give any further explanation?

A. No, that is all.

Q. You have examined these items that were not on the mortgage. Can you give the jury the valuation that you placed upon those items?

Judge Baum: We object to that as incompetent, irrelevant and immaterial, and no proper foundation has been laid.

The Court: The objection is sustained.

Q. Are you familiar with the property, this property, and had you had any experience in dealing with mining property?

A. With similar property I have, yes.

Q. And where was that experience had?

A. In Los Angeles.

Q. In connection with what type of business?

A. With phonograph record manufacturing.

Q. Did you deal in this kind of machinery, this kind of material?

A. Hydraulic compressors, electric motors, and lathes, and such things.

Q. Did you acquire a knowledge as to the values of this type of material?

A. Yes. I built a record factory and I used machinery to build it and after it was completed and I got acquainted with [30] several different machinery houses and I went to two or three sales—

(Testimony of Howard M. Courtney.)

auction sales—and I got some small amount of knowledge of the value of all kinds of machinery.

Q. From that experience can you give us the valuation of this property that you had seen which was not on the mortgage?

Judge Baum: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation has been laid, no time has been set, and the witness is not shown to be qualified.

The Court: I think at this time we will recess until 2:00 o'clock.

May 18, 1951—2:00 o'Clock P.M.

The Court: The objection will have to be sustained to the question which was asked just before the recess.

Mr. Bistline: May I ask the Court upon what ground so that I may attempt to ask it again?

The Court: He is not qualified.

Q. Mr. Courtney, calling your attention again to the day you were at the bank and the arrangement was made for the loan to the mining company, state whether or not at that time you asked him to write down your instructions concerning the loan?

A. I did.

Q. And what did he say? [31]

A. He said: "That is not necessary, we do business different in Idaho to what they do in other places, it is not necessary."

Q. Was there any other or further conversation concerning those instructions?

(Testimony of Howard M. Courtney.)

A. I repeated them at least two or three times. I asked if he was bonded to take care of the different things and when I went out of the door I asked him again if he understood what I wanted and I told him again.

Q. Now in regard to your question as to whether he was bonded, was that to take care of the business?

A. Yes, sir.

Q. As an escrow holder?

Judge Baum: We object to that as leading.

The Court: Perhaps it is, but he may answer.

A. Yes, sir.

Q. Have you had any other experience in dealing with or handling or in regard to such equipment and machinery and items similar to these in regard to their value?

A. I was a steel car builder for the railroad for a good many years, and I built different kinds of farm machinery, and also this record factory, completely built out of this junk. I know how it is constructed and what it costs to construct it, yes, sir.

Q. Did you examine this machinery?

A. Yes.

Q. And the location where it was?

A. Yes, sir. [32]

Mr. Bistline: Now may we renew our offer to have this man testify as to the values?

Judge Baum: And we will renew our objection.

The Court: I must sustain the objection.

Q. At the time you made this loan you were familiar with the machinery at the time?

(Testimony of Howard M. Courtney.)

A. Yes, sir.

Q. You dealt in machinery? A. Yes, sir.

Q. Are you familiar with the market value of that machinery, or similar machinery at that time?

A. Yes, I was.

Q. From your experience in handling such machinery you became familiar with its value?

A. Yes, sir.

Mr. Bistline: Now may we renew our offer to prove the value?

Judge Baum: And we again renew our objection.

The Court: Sustained.

Q. Mr. Courtney, in the year 1949, in the spring of that year, did you go to the mine at Challis?

A. Yes, sir.

Q. About when did you get there?

A. May, I think, or it could have been June.

Q. With whom did you go?

A. L. B. Johns. [33]

Q. At that time did you go to the mining property? A. Yes.

Q. Did you make an inspection of the property that was present at that time? A. Yes, sir.

Q. Will you tell the jury what property you had upon your mortgage that was at the mining company property at that time?

Judge Baum: Now we shall object to this as entirely immaterial.

The Court: Yes, it is immaterial, he has told

(Testimony of Howard M. Courtney.)

you that he listed the machinery that he inspected at the mine.

Mr. Bistline: But this is in 1949.

The Court: After all this transaction was over?

Mr. Bistline: Yes, sir.

The Court: Then the objection is sustained to that, it would not be material here.

Mr. Bistline: I think that is all. You may cross-examine. [34]

Cross-Examination

By Judge Baum:

Q. You are living where now?

A. Dardenelle, Arkansas.

Q. How old are you? A. Forty-eight.

Q. When did you leave California?

A. About two years ago, that is approximately.

Q. The first time that you met Mr. Davis was when?

A. The day we went in to fix the papers, that was the 23rd of September, 1947.

Q. You had never been in that bank before?

A. No.

Q. Who went into the bank with you?

A. Several, Mr. Haygood, Mr. Bassett, Johnson, and Morton.

Q. Anybody else? A. Yes, Paul Mills.

Q. Did Mr. Morton go to the bank?

A. Yes.

Q. And did Mr. Mills? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Did they stay while the negotiations were going on?

A. Yes, they were in and out; they were there a part of the time.

Q. Both of them, both Mr. Mills and Mr. Morton, while you were negotiating?

A. Yes, I was facing Mr. Davis and they were back of me, milling back and forth. [35]

Q. Who introduced you to Mr. Davis?

A. Mr. Johnson or Mr. Haygood; they seemed to be running the show.

Q. You saw a list of the property that day?

A. No, sir.

Q. Can you list the property that you,—let me withdraw that,—what was the first thing said when you went into the bank?

A. Well, we were introduced.

Q. And what was the next thing that occurred?

A. Well, I presume that Mr. Johnson or Mr. Haygood said: "This is the man that is supposed to advance us the money" and we started the conversation.

Q. And then who spoke up?

A. Well, he probably asked what we wanted or what he could do for us.

Q. Did he ask you what you wanted?

A. Yes, sir.

Q. And who answered that question?

A. I did.

Q. Mr. Johnson and Haygood didn't say anything?

(Testimony of Howard M. Courtney.)

A. No, not then, I was doing the talking. I was talking to him at that time.

Q. And what did you say?

A. I told him what I wanted.

Q. You told him what you wanted?

A. Yes, sir, I wanted a list of the stuff just like the bank's mortgage was on all of their [36] property.

Q. On what property?

A. On the mill and mine property, on the truck, and the welder.

Q. And what other property?

A. The mill buildings, the assignment of the lease, the welder, and the truck, on all of the property the bank had.

Q. What was said about the assignment of the lease?

A. They didn't know how to write it; they were going to get an attorney.

Q. Who drafted that? A. Mr. Johnson.

Q. Mr. Davis didn't have anything to do with that? A. Well, he assisted.

Q. Did Mr. Davis say anything to you that day concerning the fact that he wasn't an attorney and that you should get an attorney for that?

A. Yes, he did.

Q. Isn't it a fact that was drawn up the street somewhere?

A. It was drafted, that is all I know about it.

Q. Who drafted it?

A. Mr. Davis or Mr. Johnson.

(Testimony of Howard M. Courtney.)

Q. Mr. Davis assisted in drafting it?

A. The rough draft with a pencil.

Q. That was after he told you to get an attorney?
A. Yes, sir.

Q. When did you see the bank's mortgage?

A. I saw a copy in Los Angeles.

Q. You saw a copy in Los Angeles? [37]

A. Yes, sir.

Q. When was that?

A. That was about two months before I advanced the loan.

Q. Mr. Davis didn't show you the mortgage?

A. No, sir.

Q. You didn't go to the records, the county records, to see it?
A. No, sir.

Q. Do you know if the original was like the copy?

A. You say do I know whether the machinery was like the copy?

A. No, I asked do you know whether the copy was like the original mortgage?

A. It was the same as the machinery there.

Q. How do you know?

A. Because I checked it against the machinery.

Q. You didn't check the copy that you saw against the original in the recorder's office?

A. No, sir.

Q. Do you know that Mr. Bassett had a mortgage on a part of the Fourth of July Mining Company equipment?
A. Yes, sir, I do.

Q. Did you ever see that mortgage?

(Testimony of Howard M. Courtney.)

A. No.

Q. Do you know the amount?

A. It was around a thousand dollars.

Q. You knew that Mr. Bassett had a mortgage on this truck and welder when you were in the bank that day?

A. Yes, sir. [38]

Q. You say that you gave him the directions how to draw the mortgage?

A. Yes, sir.

Q. You asked him to put the directions in writing?

A. Yes.

Q. And what did he say?

A. He said that it wasn't necessary, he said: "He said we don't do business that way."

Q. And did you repeat it again?

A. Yes.

Q. And what did he say?

A. He said, "We don't do business that way."

Q. That was when you asked him to put it in writing?

A. Yes, sir.

Q. You repeated the directions?

A. Yes, I repeated what were the directions and I asked him if he understood it.

Q. How many times did you repeat the instructions of what to put in the mortgage?

A. Three or four times.

Q. Was that including the time when you said you were going out of the door?

A. Yes, sir.

Q. You told him all this property that you wanted in this mortgage?

A. Yes, sir. [39]

Q. You say that you repeated it four times?

A. At least.

Q. Will you repeat it to me again?

(Testimony of Howard M. Courtney.)

A. That I wanted exactly,—

Q. Repeat to me what you said to him.

A. I want exactly what is on your mortgage, what you hold, I want what is on the mortgage that you hold.

Q. You didn't list the property?

A. No, sir.

Q. You didn't tell him that you wanted this item or that item?

A. I wanted him to copy his list.

Q. From the time that you went out of the door there at the bank, how long was it before you were back in?

A. One year.

Q. Didn't you come back that day?

A. No, sir.

Q. You stayed in there all of this time?

A. Nearly an hour.

Q. And as you went out you were still telling him what you wanted in the mortgage?

A. To be sure to get it right.

Q. And was the mortgage signed at that time?

A. It was not.

Q. The escrow was signed?

A. Yes, sir.

Q. The mortgage was not signed in your favor?

A. No, sir. [40]

Q. From the time you got in there until you left, the only thing that was done was you handing the check over and the drawing of the escrow papers?

A. And the drafting of the lease assignment, that took considerable time.

Q. That was prepared?

A. Yes.

(Testimony of Howard M. Courtney.)

Q. Was it signed?

A. No, it wasn't even drawn, it was just drafted.

Q. What is the difference?

A. Well, drafting is just a rough sketch, but the drawing is the finished copy.

Q. Who did the drafting of this?

A. Mr. Johnson or Mr. Davis or both.

Q. And who did the drawing?

A. It wasn't drawn.

Q. From the time you went into the bank until you left you had not been out at all? A. No.

Q. The only signature that you saw was your signature on this bank draft?

A. That is right.

Q. Did you see the check that was made out by you to the Fourth of July Mining Company?

A. I guess so, I made it out.

Q. It was all completed? A. Yes, sir. [41]

Q. And did you see the check from the Fourth of July Mining Company to the bank?

A. No, I didn't.

Q. The escrow papers were prepared?

A. Yes, sir.

Q. And you took your copy that day?

A. Yes, sir.

Q. And it had a list on there of what was to be in escrow?

A. Well, I attempted to get him to write it down.

Q. You accepted the escrow papers in the form that it now is? A. Yes, sir.

Q. When he handed it to you did you object?

(Testimony of Howard M. Courtney.)

A. No, I had already made my objection, but——

Q. But you accepted it in the form that he handed it to you? A. Yes, sir.

Q. And you left with it?

A. Yes, sir, that is right.

Q. Were not the papers mentioned in the escrow put in that file?

A. The papers that were mentioned were put in, yes.

Q. All of the papers mentioned in this escrow agreement were put in the file? A. Yes, sir.

Q. And the next summer, I believe you say, you saw it? A. Saw what?

Q. Saw the bank file, this escrow file?

A. No, sir. [42]

Q. When you were in the bank in 1948, didn't you see it? A. I did not.

Q. That was the time he gave you a copy of the mortgage?

A. I never saw the original at that time.

Q. What did you understand was in the bank mortgage that you did not see in your mortgage?

A. Well, there was the large ore crusher, the fine ore crusher, the ball mill, the three-cell flotation, and the single cell flotation.

Q. And that is all? A. Yes.

Q. Is that property that was,—who claimed that if you know? A. I don't know.

Q. You didn't know who claimed that property?

A. No, sir.

(Testimony of Howard M. Courtney.)

Q. Did you understand that it was owned by the Fourth of July Mining Company? A. I did.

Q. And that there was no claim on it?

A. There was a claim or claims against it.

Q. Who did you understand was claiming it?

A. I understood that there was a claim of a mortgage against it.

Q. And who held that mortgage?

A. The Custer County Bank.

Q. Who else?

A. I didn't know of anyone else holding a mortgage on this particular property. [43]

Q. That is the property that you have just referred to? A. That is right.

Q. And when did you become aware that the mortgage in your name did not cover all of the property mentioned in the bank's mortgage?

A. That was in August of 1948.

Q. That is the first time that you knew that there was a difference in the property described in the two mortgages? A. Yes, sir.

Q. Where did you get that information?

A. From Mr. Davis.

Q. Did he say anything about that?

A. Well, under pressure he gave me a copy.

Q. Did he tell you that day about your mortgage not having all of the property described, that was described in the bank mortgage, in your mortgage?

A. I don't quite understand, but I got the information from him in the copy.

Q. Did he tell you anything that day?

(Testimony of Howard M. Courtney.)

A. He told me that the lists must have gotten mixed.

Q. How do you know that your mortgage didn't cover all of the property mentioned in the bank's mortgage?
A. I could see.

Q. After looking at the mortgage you knew that there was a difference?
A. Yes, sir. [44]

Q. And what is the difference?

A. The difference between the two is that in this one you don't have the large ore crusher.

Q. And what else?

A. The fine ore crusher.

Q. And what else?
A. The ball mill.

Q. Anything else?

A. Yes, the single cell flotation and the three-cell flotation.

Q. Yes?

A. And the 150 horse power diesel motor with the direct driven generator.

Q. And what else?

A. That is all that I recall right now.

Q. What did you compare this mortgage that he gave you a copy of with so that you would know that it didn't have some of the property that the bank mortgage had?
A. When?

Q. At the time you say you compared this, what did you compare the copy of the mortgage that Mr. Davis gave you was so that you knew that the bank had other items than you had in your mortgage?

A. I remembered the machinery.

Q. You remembered over a year and a half or a

(Testimony of Howard M. Courtney.)

year and two months what was supposed to be in the mortgage? A. Certainly. [45]

Q. And it was when you saw this mortgage that you discovered it? A. Yes, certainly.

Q. And that is the first time that you knew you had a mortgage that didn't have all of the property that you thought was supposed to be in there?

A. Yes, sir.

Q. What was said the first day that you were in the bank, what else,—you have told us about the directions that you gave, what else was said?

A. That is it.

Q. That is all?

A. That is all that I said to him.

Q. When did you ask him about being the escrow agent? A. During the day.

Q. Then you did have some other conversation besides the directions?

A. Well, I gave the directions over and over.

Q. And when did he say that he was bonded as an escrow agent?

A. During the conversation.

Q. What did you ask him and what did you say?

A. I asked if he was bonded and could take care of this, and he said: "Yes."

Q. Did you pay him any money for this work?

A. No, sir, I asked him,—

Q. You didn't pay him? A. No. [46]

Q. Didn't he tell you that he didn't take any money for drawing a mortgage? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Did you pay the escrow fee? A. \$17.00.

Q. Who paid that fee?

A. So far as I knew the Mining Company. I don't even know that it has been paid.

Q. Mr. Haygood is a relative of yours, is he not?

A. Yes, sir, he is.

Q. When did you first know about Mr. Reamsnyder and Becker?

A. I guess the first time that I went to the mine, I thought that it was Reamsnyder and his son, but it was Reamsnyder and Becker.

Q. Do you know what property they were claiming?

A. I don't know that they were claiming any.

Q. When did you find out that they were claiming property that the Fourth of July Mining Company had an interest in?

A. That was about August, 1949.

Q. The first time that you knew that Reamsnyder and Becker were claiming any of the Fourth of July Mining Company property was in August or September of 1949?

A. Yes, that is, other than shares in the company.

Q. Then you were advised that they were claiming what?

A. The equipment left off my mortgage. [47]

Q. And that is the equipment you have described that was left off this mortgage? A. Yes, sir.

Q. You were never advised of that until you

(Testimony of Howard M. Courtney.)

made your trip to Idaho in August or September of 1947?

A. I think it was in August, it was in July, August or September, and I think it was in August.

Q. And that is the first time you were informed?

A. Yes, sir.

Judge Baum: Have you the original letters that I asked you to produce, Mr. Bistline?

Mr. Bistline: I have one of them.

Q. I note, Mr. Courtney, on the escrow agreement that you were to get some shares of stock in the Fourth of July Mining Company, was that right? A. No.

Judge Baum: May I see that escrow agreement?

(Exhibit handed to counsel.)

Q. You had a choice to take money or stock?

A. Yes, sir.

Q. You could ask for \$6,000.00 or 15,000 shares of stock? A. That is right.

Q. You later became a shareholder in the mine?

A. That is right, I did.

Q. Along in March your note became due?

A. Yes, probably about that date. [48]

Q. After that you took some stock?

A. Yes, sir.

Q. And you granted an extension to them on their note? A. Yes, sir.

Q. I hand you what has been marked for identification as exhibit No. 5, being a letter. Did you sign that? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Do you know Mr. Haygood's signature?

A. I am not too familiar with it.

Q. Do you know Mr. Howard E. Johnson's signature?
A. No, I don't.

Q. That exhibit is in the same condition as when you saw it?

A. Yes, it seems to be. I don't know what this mark is (indicating).

Judge Baum: We will explain that later. We offer now Defendants' Exhibit No. 5.

The Court: I think that will be admitted.

Q. You received, did you not, when you were in the bank in July or August, 1948, some shares of stock in this mining company?

A. Yes, I did, it was in July, I think, and I think it was in 1949.

Q. Wasn't that in 1948?

A. Yes, at the time I picked up the copy of the mortgage.

Q. Then whatever time you got the copy of the mortgage you received two certificates of stock in the amount of 2,000 shares each?

A. Yes, I don't remember the amount, but I did get the certificates. [49]

Q. And that was a part of the consideration for the extension of your note for an additional year?

A. Yes, but it was eleven months, not a year.

Q. Do you recall receiving that letter which has been handed to you, and which was marked as Defendants' Exhibit No. 6?

A. Yes, I remember getting that.

(Testimony of Howard M. Courtney.)

Judge Baum: We move the admission of that as Defendants' Exhibit No. 6.

Mr. Bistline: We have no objection to that.

The Court: It may be admitted.

Q. As I recall you say the only thing that was signed when you left the bank was the cashier's check, your check and the escrow agreement?

A. That is right.

Q. This assignment of lease was not signed?

A. No.

Q. And the minutes were not there?

A. No.

Q. The only paper that you signed was this draft or these checks and the escrow agreement?

A. That is right.

Q. Is that your signature thereon (indicating)?

A. It seems that I did,—yes, I remember, O.K.

The Court: All he asked you, Mr. Witness, was, is that your signature?

A. Yes, that is my signature. [50]

Q. And you signed that on the 23rd of September, 1947?

A. That is the only time I was there.

Q. You signed it when you were in the Custer County Bank at the time you were there on the 23rd of September, 1947?

A. I approved it, I don't remember signing, but I must have at that time.

Judge Baum: We move the admission of this as Defendants' Exhibit No. 7.

Mr. Bistline: We have no objection.

(Testimony of Howard M. Courtney.)

The Court: It may be admitted.

Q. You have a copy of the original of the letter that I demanded from your counsel, do you remember receiving the original of that from Mr. Davis or the Custer County Bank?

A. Yes, sir, I do.

Q. Do you know where the original is?

A. No, I don't.

Judge Baum: We move the admission of No. 8, that is this instrument I hold here.

Mr. Bistline: No objection.

The Court: It may be admitted.

Q. Mr. Courtney, do you recall receiving a copy of the letter that I hand you, it is now marked as exhibit No. 9,—do you recall receiving the original of that? A. Yes, I do.

Judge Baum: We move its admission at this time as exhibit No. 9. [51]

Mr. Bistline: We object to this as immaterial and incompetent, the original has been admitted.

Judge Baum: If it is admitted then we don't want to offer the copy. I will withdraw this offer.

The Court: It may be withdrawn.

Q. I hand you what has been taken from the file, the original escrow, does that bear your signature?

A. Yes, sir.

Q. Was it in that form when you signed it?

A. Yes, it was.

Mr. Bistline: If that is offered, I have no objection. It is the original of another exhibit which is in the record.

(Testimony of Howard M. Courtney.)

The Court: It is the original with the signatures, and it may be admitted.

Q. Did you on September 23, 1947, ask for a copy of the mortgage?

A. Yes, copy of the bank's mortgage.

Q. You asked for a copy of the bank's mortgage? A. Yes, sir.

Q. What did he tell you?

A. That he didn't have it available.

Q. Was that after you had given the instructions as to the new mortgage? A. Yes, sir.

Q. You asked for a copy of the bank's mortgage? A. Yes, sir. [52]

Q. And he said that he didn't have it available?

A. That is right.

Q. You didn't ask for a copy of your mortgage?

A. No.

Q. You didn't go to the county recorder's office?

A. No, sir.

Q. Is there only one firm of Reamsnyder and Becker in that county?

A. That is all I ever heard of.

Judge Baum: I think that is all.

Redirect Examination

By Mr. Bistline:

Q. At the time that you granted the extension on the mortgage as reflected by this exhibit, did you know of the omission of the property on your mortgage? A. No, sir.

(Testimony of Howard M. Courtney.)

Q. Do you recall when that extension was granted?

A. Yes, probably in March of 1948.

Q. Mr. Courtney, if you had known of the omission of this property from your mortgage, would you have granted the extension? A. No, sir.

Q. If you had known at the time you made the original loan to the Company, on the day that the loan was made, that the Company had mortgaged property to the bank which it did not own, would you have made the loan?

A. No, I would not. [53]

Q. When did you receive the stock certificates that were turned over to you as consideration for the extension?

A. I picked up the copy of the mortgage at the same time,—I don't remember the date.

Q. Counsel asked if Mr. Haygood was a relative of yours? A. Yes, sir, he is.

Q. What is that relationship?

A. He is a grandson of my father's half brother.

Q. How often have you seen him?

A. I never saw him until we were both past forty,—I know that I was past forty anyway before I even saw him.

Q. Handing you what has been admitted as Defendants' Exhibit No. 6, I will ask you under what circumstances you signed that?

Judge Baum: We object to that, under what circumstances would be immaterial. He said that he signed it in the bank.

(Testimony of Howard M. Courtney.)

The Court: Yes, he has testified to that.

Q. I will ask you if you know the purpose for which that was signed?

Judge Baum: We object to that as immaterial.

The Court: It is in the agreement itself, but he may answer.

A. What do you want to know?

Q. Do you know for what purpose that was signed by you?

A. No, I don't,—I don't see any reason for it. [54]

Q. I will ask you if you know if that is a part of the property that you requested in your assignment of leased claims? A. Yes, sir, it is.

Q. Had you signed any other papers in the bank that day besides this and the escrow agreement?

A. That is all, I am positive that is all.

Q. Do you know who requested you to sign this?

Judge Baum: That is objected to as immaterial.

The Court: He may answer.

A. I requested it to be drawn.

Q. Do you know who drew it?

A. Mr. Johnson and Mr. Davis drew it but from there on I don't remember. I approved it but I don't remember signing it, but that is my signature. The best I recall is that I do remember approving the rough draft of it verbally.

Q. Were you to receive the assignment of the lease as a part of your security that day?

A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. What was the connection of that with this lease, is that an assignment of the lease?

A. It appears to me to be.

Q. Do you have any interest in the property assigned by that agreement?

The Court: Isn't that the best evidence,—he may answer, go ahead.

A. It doesn't have any signature except [55] mine.

Mr. Bistline: I think that is all.

A. I wasn't given any other.

Mr. Bistline: You may cross-examine, Judge Baum.

Recross-Examination

By Judge Baum:

Q. When you talked about drafting and drawing an instrument,—is that the one?

A. Yes, sir.

Q. That is the only instrument you had in mind when you talked about drafting and drawing an instrument?

A. No.

Q. What did you have in mind?

A. That was not what I had in mind. This seems to be an assignment from Reamsnyder and Becker.

Q. That is the assignment of lease, isn't it?

A. This is the lease.

Q. You signed it that day?

A. I don't know. I don't remember ever seeing this before. I thought it was something else. I

(Testimony of Howard M. Courtney.)

looked at it about ten minutes before I understood what it was,—this is between Reamsnyder and Becker and me.

The Court: I think you have answered the question.

Q. Is that the one that you referred to when you were talking about the drafting and drawing of an instrument? A. No, sir. [56]

Q. Which one was it you talked about when you referred to going to an attorney?

A. That was another.

Q. I will ask you if the instrument that you now have was the one that you were referring to, if you know? A. I wouldn't say that it was.

Q. You don't think that it was?

A. No, the one that was drafted that day,—it doesn't seem the same as the one that was drafted.

Q. Will you look at proposed exhibit No. 11 and I will ask you if you ever saw that list, that paper?

A. No, sir.

Q. Was not a list similar to that list—a list like that handed around at the time this mortgage was drafted? A. It wasn't handed to me.

Q. In the bank you were seated around a desk?

A. Most of them were standing.

Q. They were close together?

A. They were back around the desk.

Q. Did you see them with a list?

A. No, sir.

Q. Did you hear any of them say: "Here is the list to be included in the mortgage"?

(Testimony of Howard M. Courtney.)

A. No, sir.

Q. Would you say that you didn't see that list?

A. No, I didn't. [57]

Q. Or a similar piece of paper?

A. No, sir, I didn't.

Judge Baum: That is all.

Redirect Examination

By Mr. Bistline:

Q. Mr. Courtney, part of the security that you requested was the assignment of the lease of the mining claims? A. Yes, it was.

Q. Do you know if this instrument was executed in connection with that assignment?

Judge Baum: He said that he didn't know the purpose of this.

The Court: I think that is right. Of course, if he has changed his mind on that he may answer.

A. No, I don't understand this.

Q. You will observe the recital concerning the consideration of \$10,000.00? A. Yes.

Q. Do you know who was to pay that or how it was to be paid?

The Court: I think, Mr. Bistline, that he has said he didn't know anything about that, but maybe he does now, he may answer.

A. I don't know.

Mr. Bistline: I have nothing further.

Judge Baum: That is all.

The Court: At this time we will take a short recess. [58]

(Testimony of Howard M. Courtney.)

3:00 o'Clock P.M.—May 18, 1951

Mr. Bistline: I would like to ask another question or two if I may.

The Court: You may do so.

Redirect Examination

By Mr. Bistline:

Q. Mr. Courtney, during the recess did you have an opportunity to look at the assignment or agreement and also Exhibit No. 7 as it is marked now, the same exhibit? A. Yes, sir.

Q. Having stated that, and having looked at it, do you recall that now? A. Yes, sir, I do.

Q. Will you tell the jury just what that recalls to you? A. Yes, sir.

Judge Baum: We object to that on the ground that the instrument is in writing.

Mr. Bistline: May I ask another question?

Q. I will ask you why that was signed and included in the escrow at that time?

The Court: I think it was testified to that it was a part of the escrow, that assignment was a part of the escrow.

Judge Baum: We object to it as it speaks for itself. [59]

The Court: He may answer, but I think he has testified to it. You may go ahead.

A. That was an assignment that was to go back after they paid the mortgage to me, and not being

(Testimony of Howard M. Courtney.)

interested that far ahead,—you see I was sleepy and tired, and I didn't pay too much attention, I remember now.

The Court: You have answered the question.

EDWARD B. HAYGOOD

called as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bistline:

Q. Where do you reside?

A. Del Monte, California.

Q. How long have you resided there?

A. A little over two years this last time.

Q. Are you a relative of Mr. Courtney's, the party who just testified? A. A distant cousin.

Q. Were you at one time interested in the Fourth of July Mining Company?

A. I was in the Fourth of July Company, yes.

Q. Did you hold any office?

A. As President, yes, sir.

Q. When were you President of the [60] Company?

A. The exact dates I don't know, and I don't know what time it was, but it was during about the time of this trial,—I was President during the time of this deal taking place. I was President then. I would say that I was there a year or a year and a half.

(Testimony of Edward B. Haygood.)

Q. Are you familiar with the property mortgages to the Custer County Bank prior to the Courtney loan?

A. What was there, I was, yes, sir.

Q. Are you familiar with the property on that mortgage to the bank? A. Yes, sir.

Q. Will you state what the facts is as to the property being on that mortgage that did not belong to the mining company?

Judge Baum: That is objected to as immaterial.

The Court: The objection is sustained.

Q. Prior to the making of the Courtney loan had you met with the bank officials concerning the mortgage that they held? A. I had, yes.

Q. Where did you meet,—I mean when did you meet with the bank? A. On several occasions.

Q. With whom did you meet?

A. With Mr. Davis.

Q. Will you tell the court and jury what the purpose of the meeting with Mr. Davis was?

Judge Baum: Objected to as immaterial.

The Court: We are not interested here in a mortgage between Mr. Davis and the Company, or Mr. Haygood [61] and the bank, or any difficulty they may have had with any other mortgage. The only mortgage in question here is the Courtney mortgage.

Q. Mr. Haygood, do you recall September 23, 1947? A. Yes, sir.

Q. Do you recall Mr. Courtney coming to Challis on that day? A. Yes, sir.

(Testimony of Edward B. Haygood.)

Q. What time did he arrive there?

A. Sometime around noon.

Q. Where did he come from, if you know?

A. From Los Angeles.

Q. How did he travel? A. By automobile.

Q. Did you meet with Mr. Courtney at that time?

A. Yes, he was at the bank when we arrived.

Q. Which bank?

A. The Custer County Bank of Challis.

Q. Who went to the bank?

A. Mr. Courtney, myself, Howard Johnson, Mr. Bassett, Mr. Morton, and Mr. Mills.

Q. What was the purpose of that meeting?

A. To get a loan of \$10,000.00 from Mr. Courtney to pay off certain obligations and mortgage that we had with the Custer County Bank.

Q. After you met him you went into the bank, did you? A. That is correct. [62]

Q. And what took place inside of the bank?

A. Well, naturally, there were introductions and some discussions before we actually got down to the business at hand. When we did get down to the business Mr. Courtney asked Mr. Davis if he would act as his agent,—not as his agent, but to take care of certain obligations.

The Court: Will you just use the words that were spoken between Mr. Davis and Mr. Courtney,—that is what we want, the conversation.

A. Mr. Courtney asked Mr. Davis if he would handle these problems on this mortgage and the

(Testimony of Edward B. Haygood.)

escrow, if he would handle the escrow, and Mr. Davis told him that he would, and Mr. Courtney told him what he wanted. He told him what the stipulation was.

The Court: Can't you just state the conversation?

A. As far as the conversation is concerned,—Mr. Courtney told Mr. Davis that he wanted everything that the Fourth of July Company had, the mill, mining machinery, and other machinery, the mining and milling machinery, and any kind of machinery that would be accumulated in the future until his note was paid off.

Q. What did Mr. Davis say?

A. Mr. Davis agreed to handle the agreements and everything.

The Court: I don't want to continually interfere, but can't you just state what he said,—not what your conclusion was, but give the actual [63] words.

A. Well, the actual words,—it come down to the same thing.

The Court: Now, Mr. Witness, you just answer the question and not just say that it will come down to the same thing. The jury is here to interpret your testimony as to whether it comes down to the same thing.

A. Mr. Davis told him that he would handle it.

Q. And what was done next?

A. Well, there was an escrow agreement drawn up.

(Testimony of Edward B. Haygood.)

Q. Who drew the escrow agreement?

A. Well, there was certain stuff that they put in.

Q. Who drew it?

A. Mr. Davis, but Mr. Courtney put in what he wanted in it.

Q. Did Mr. Courtney deliver any money at that time?

A. Yes, he deposited a check, a personal checking account in the Custer County Bank.

Q. Do you know for how much?

A. \$10,000.00.

The Court: There is no question but that Mr. Courtney deposited a draft for \$10,000.00 and issued his check to the mining company for \$10,000.00, so I cannot see any reason for any dispute on that.

Q. Will you examine this check,—is that your endorsement on the back of it? A. Yes, sir.

Q. From whom did you receive that check?

A. From Mr. Davis. [64]

Q. Do you know to whom Mr. Courtney delivered that check? A. To Mr. Davis.

Q. When did you receive that check from Davis?

A. At the completion of the contracts for all the mine and machinery.

Q. How long was Mr. Courtney at the bank that day?

A. I would say an hour or maybe a little more.

Q. During the time that Mr. Courtney was at the bank had the mortgage been prepared?

(Testimony of Edward B. Haygood.)

A. No.

Q. Had the assignment of the claims been prepared? A. I believe it had.

Q. And had the extract from the minutes of the mining company been furnished? A. No.

Q. When were they furnished?

A. About two days later.

Q. Were you present at the time the mortgage was prepared? A. Yes, sir.

Q. Who prepared the mortgage?

A. Well, Mr. Johnson and Mr. Davis did most of the writing up to then.

Q. You were an officer of the company at that time? A. Yes, sir.

Q. Do you know what property of the company was included in the mortgage? [65]

A. The mortgage that was signed?

Q. Yes. A. Yes, sir.

Q. Was there a list of that property belonging to the mining company? A. Yes, sir.

Q. Was that prepared from that list?

A. Yes, sir.

Q. Do you know if that list was ever submitted to Mr. Courtney? A. Not to my knowledge.

Q. Are you familiar with the property that was mortgaged to Mr. Courtney? A. Yes, sir.

Q. Are you familiar with the mining property?

A. Somewhat.

Q. Are you familiar with the claims of the mining company? A. Yes, sir.

(Testimony of Edward B. Haygood.)

Q. Are you familiar with the mining property that the corporation owned at that time?

A. Yes, I think so.

Q. With respect to the properties that were mortgaged by the mining company to Mr. Courtney, can you give us the value of the items mortgaged to Mr. Courtney,—let me ask you this, are you familiar with the value of that property?

A. Yes. [66]

Q. Now, can you give us the values of the property that was mortgaged?

A. Possibly some of the items.

Q. Can you give us the valuation of the Chicago compressor? A. Yes, sir.

Q. What was that?

Judge Baum: We object to that on the ground that no foundation is laid and no time or place is fixed.

Mr. Bistline: This is the President of the corporation,—I will ask another question.

Q. I want you to fix the valuation as of September 23, 1947; with that time fixed and the location of the property, what was the value of the Chicago compressor? A. \$300.00.

Q. And what was the value of 500 feet of air hose?

Judge Baum: We object to that as no proper foundation is laid.

The Court: The objection is sustained.

Q. Are you familiar with the 500 feet air hose that the mining company owned? A. Yes, sir.

(Testimony of Edward B. Haygood.)

Q. Do you know the value of it?

A. \$100.00.

Q. My question was do you know the value of it? A. Yes, sir. [67]

Q. At that time? A. Yes, sir.

Q. What was the value of that?

A. \$100.00.

Judge Baum: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation laid, and no time is stated, nor is the condition of the property; it is immaterial, there is no representation made by either defendant as to value.

The Court: The objection is sustained at this time. It is a well recognized rule of law that market value is the value at the place the property is situated, and the price fixed, or the value fixed by a seller and a buyer willing to buy and sell. The buyer willing to buy but not forced to buy, and the seller willing to sell but not forced to sell. That is a well recognized rule of law in fixing market value.

Q. You are familiar with the property that was mortgaged to Mr. Courtney?

A. That is right.

Q. You had inspected it recently?

A. Yes, sir.

Q. You had made up a list of it?

A. I helped make up a list.

Q. You are familiar with the condition in which it was at that time? A. Yes, sir. [68]

Q. Bearing in mind the definition of market

(Testimony of Edward B. Haygood.)

value that the Court has given us, can you fix the value of this property that was mortgaged to Mr. Courtney?

Judge Baum: We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid.

The Court: The objection is sustained.

Q. Bearing in mind the condition of the property, the location of the property as you had it examined, or as you had examined it, and the market value of property is the value offered by a person who doesn't have to buy, and the price that he would pay to a person who doesn't have to sell, but would sell, can you fix the value of the 500 feet of air hose?

The Court: I don't think it is material; the objection, if it was renewed, would be sustained. The property was mortgaged and the only complaint you have is that there was property that was not included in the mortgage that the bank had been instructed to put in.

Q. At the bank, what was said by Mr. Courtney to Mr. Davis about including all of the property?

Judge Baum: That is objected to, it has been asked and answered.

The Court: Yes, he has testified that Mr. Courtney instructed Mr. Davis.

Q. Was there any reference made in that conversation with regard to a 150-horsepower [69] motor?

Judge Baum: We object to that, the witness has

(Testimony of Edward B. Haygood.)

detailed the conversation in full. This is leading and suggestive.

The Court: The objection is sustained.

Mr. Bistline: That is all.

Cross-Examination

By Judge Baum:

Q. You had prepared a list of the property?

A. Yes, sir.

Q. When did you prepare that?

A. Oh,—it was after,—I would say it was after May, it was about June or July.

Q. That was property that was owned by the mining company that was clear?

A. That is right.

Q. You had that list with you that day at the bank?

A. No, I didn't have my list at the bank.

Q. There was a list at the bank?

A. If there was I didn't see it.

Q. Didn't you know,—or rather, didn't you hand Mr. Davis a list?

A. Long before that, and that contained a list of all of the property that the mining company owned that was clear.

Q. Would you recognize that list again?

A. I think so. [70]

Q. Was that list which was handed to you the same list that was handed to Mr. Davis by you?

A. It is.

(Testimony of Edward B. Haygood.)

Q. That is the list? A. Yes, sir.

Q. That was prior to the time that this mortgage was executed? A. Yes, sir.

Q. That comprised all of the property of the Fourth of July Mining Company that was clear?

A. That is right.

Judge Baum: We move the admission of Defendants' Exhibit No. 11.

Mr. Bistline: To which we object on the ground that it is hearsay evidence, and it was not prepared in the presence of Mr. Courtney, and it has not been shown who prepared it, when it was prepared, or whether it was ever exhibited to Mr. Courtney by anyone.

Judge Baum: We will withdraw it at this time.

Q. When did you hold a corporation meeting with reference to this \$10,000.00 loan?

A. It was sometime before.

Q. You had a certified copy of the minutes there? A. No, we didn't.

Judge Baum: I believe that is all. [71]

Mr. Bistline: At this time the plaintiff will rest.

Judge Baum: I think, if the Court please, that Mr. Courtney testified that he wanted in the mortgage all of the property that they owned, and this witness has testified that all of the property was in this list, that it was all of the property that they owned, and that was the reason for the offer of this exhibit.

The Court: That is propably true, but in view of the testimony that has gone in, in view of Mr.

Courtney's testimony, I will not admit the exhibit.

Judge Baum: I would like to make a motion.

The Court: Very well, I will excuse the jury at this time.

(In the absence of the jury.)

Judge Baum: Comes now the Defendants, and each of them, the Plaintiff having rested, and moves the Court for an order of non-suit for the following reasons:

(1) That sufficient evidence has not been adduced during the trial to warrant the court in submitting this to the jury in this;—in particular that at no time has any evidence been introduced showing the value of the property that was presumed to be put in the mortgage; likewise, the property that was included in the mortgage, now value has been shown; that is, as to whether [72] the value of the property in the mortgage was or was not sufficient to pay off the obligation of the plaintiff;

(2) For the further reason that it is not shown that there was ever any foreclosure property, that the property is not now in existence, it has not been shown, nor what the value of it is now or was at the time of the discovery, if there was a discovery, that the mortgage did not include all of the property;

(3) That there has been a total failure to show any damage of any amount of money, not one dollar. There is no sufficient evidence to submit the

matter to the jury, and there can be none until the security has been exhausted. There is no evidence of any wanton waste of the property, in fact, there is no evidence whatever to go to the jury in this matter.

The Court: I will take a five-minute recess and determine whether I wish to hear any argument on this motion.

3:45 P.M. o'Clock—May 18, 1951

The Court: In this case I don't feel that there is any necessity to have any argument on this motion. I will treat the motion as a motion for a directed verdict under the rules of the court. It seems to me that in this case there is an entire failure of proof that the plaintiff had been damaged. It also appears from the evidence that [73] he received stock in the mining company as a consideration for an extension of the mortgage, and that was on or about the date that he was furnished a copy of the mortgage by the bank. This act of his in accepting the stock would indicate that he accepted the mortgage,—there is no evidence that he returned the stock after he discovered the mortgage was not to his liking. There is no evidence at all but that he received something of value in the stock from the company. There is no evidence that he has exhausted his security, that is, the property that he had a mortgage on. There is no evidence in the court's judgment of any fraud on the part of the bank. If I were to present this

to the jury and they had to discuss this evidence and try to arrive at a verdict I know of no way they could determine any amount of damage that the plaintiff has sustained. I feel that there is nothing for me to do but to grant the motion.

I will appoint Mrs. McIntyre, Juror No. 1, as foreman of the jury, and I will direct you as foreman of the jury to sign this verdict for the defendants and against the plaintiff.

You, of course, understand that you assume no responsibility because the Court has decided it as a matter of law.

Mr. Clerk, you may hand the verdict to Juror No. 1 so that she can sign it. First, I will excuse the two alternate jurors.

(Whereupon the verdict was signed by the Foreman, designated by the Court.) [74]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, Hereby Certify that I am the official Court Reporter for the United States District Court for the District of Idaho; and

I Further Certify that I took the evidence and proceedings had in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into longhand (typewriting); and

I Further Certify, that the foregoing transcript, consisting of pages numbered, consecutively, to page 74, is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand
this 24th day of August, 1951.

/s/ G. C. VAUGHAN,
Official Reporter.

[Endorsed]: Filed September 4, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Defendants' Motion for Bill of Particulars, dated February 22, 1950.
3. Defendants' Motion for More Definite Statement, dated February 23, 1950.
4. Amended Complaint.
5. Answer to Amended Complaint.
6. Transcript of Testimony (all proceedings stenographically reported in regard to the trial).
7. Verdict.
8. Judgment.
9. Notice of Appeal.

10. Motion and Order Extending Time for Appeal.

11. (The designation will be forwarded as soon as it is received and filed. The above designation was made by telephone on this date.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 5th day of September, 1951.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 13085. United States Court of Appeals for the Ninth Circuit. Howard M. Courtney, Appellant, vs. Custer County Bank, a Corporation, and Oliver T. Davis, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed September 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals
for the Ninth Circuit

HOWARD M. COURTNEY,

Appellant,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,

Defendants.

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant in the above-entitled action and designates the following portions of the record, proceedings and evidence to be contained as the record on appeal in this action:

1. Original Complaint.
2. Defendants' Motion for Bill of Particulars, dated February 22, 1950.
3. Motion for More Definite Statement, dated February 23, 1950.
4. Amended Complaint.
5. Motions to Dismiss Amended Complaint.
6. Motions to Strike Amended Complaint.
7. Order of Court Overruling Motion to Dismiss and Denying Motion to Strike.
8. Answer to Amended Complaint.
9. Entire Transcript of the Evidence taken at trial.
10. Entire Transcript of All Proceedings stenographically reported at the trial.
11. Verdict.

12. Judgment Entered thereon.
13. Notice of Appeal.
14. Order Extending Time for Appeal.
15. This Designation.
16. Statement of Points.

/s/ BISTLINE & BISTLINE,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 21, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Appellant states that the points upon which he intends to rely on appeal in the above-entitled action are as hereinafter set forth, and that he deems the entire record on appeal as necessary for the consideration of the points to be relied upon, namely:

1. The trial court erred in sustaining objections to the testimony of the plaintiff and witness Howard Courtney with respect to the value of the property which had been omitted from his mortgage.

2. The trial court erred in sustaining objections to the testimony of E. B. Haygood, president of the Mining company, with respect to the value of the property and mining equipment which had been omitted from the mortgage of the Mining Company to Courtney.

3. The trial court erred in directing a verdict for the defendants in the above-entitled matter for the following reasons:

(a) There was proof that the bank and defendant had been directed to include certain property on the mortgage in question, and that the property omitted was of value, and that plaintiff had been damaged by reason of the omission thereof.

(b) In ruling that the plaintiff had received consideration for the extension of his mortgage, thereby accepting the mortgage, when in fact he had never seen the mortgage until some time after the renewal thereof.

(c) In ruling that in an action for fraud, that appellant was first required to exhaust his security.

(d) In ruling that there was no evidence of fraud on the part of the defendants.

4. The trial court erred in entering a judgment for the defendants, for the same reasons set forth in (3) hereinabove.

5. The trial court erred in not permitting said cause to be determined by the jury, in that there was sufficient evidence to make a prima facie case of fraud and maintain an action for rescission by reason of fraud..

.....,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 10, 1951.

